Lim Guan Eng v Ruslan bin Kassim and another appeal

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 02(f)-61–07 OF 2019(W) AND 02(f)-62–07 OF 2019(W)
NALLINI PATHMANATHAN, ABDUL RAHMAN SEBLI AND HARMINDAR SINGH FCJJ
26 FEBRUARY 2021

Tort — Defamation — Public officer — Whether public officer could sue for damages for defamation either in his official or his personal capacity — Whether if public officer sued in his official capacity he had to be represented by government legal officer pursuant to Government Proceedings Act 1956 ('the GPA') — Whether public officer could not engage private legal practitioner of his choice if subject-matter of suit concerned his official capacity unless GPA authorised him to do so under specific circumstances — Whether public officer's failure to have government legal officer represent him in his court proceedings rendered his whole suit and the cause papers filed therein null and void

The appellant in these appeals, Lim Guan Eng ('LGE'), was at the material time the Chief Minister of Penang. The first appeal, involving the respondent Ruslan Kassim ('Ruslan') was withdrawn and struck off as Ruslan had died before the appeals came up for hearing. The respondents in the second appeal were the political party, Pertubuhan Pribumi Perkasa Malaysia ('Perkasa') and its then president, Ibrahim Ali. In August 2011, LGE made a two-day official visit to Singapore for the stated purpose of attracting investments and medical tourism to Penang. In the course of the visit, he had attended a dinner with some Singaporean politicians. Ruslan, who was then Perkasa's chief information officer, issued a press statement — which was published in several major newspapers — alleging that LGE had attended a 'secret meeting' with politicians from Singapore's ruling party, PAP, and that Malaysians were entitled to know what was discussed at the meeting. The press statement, inter alia, questioned LGE's loyalty to Malaysia. LGE sued Ruslan, Perkasa, Ibrahim Ali and the newspapers concerned for defamation. After a full trial, the High Court allowed LGE's claim and, inter alia, ordered Ruslan, Ibrahim Ali and Perkasa to pay LGE RM150,000 as general and aggravated damages. The trial court found that the impugned statements made/published by the defendants questioned LGE's loyalty as a Chief Minister and citizen of Malaysia and insinuated that he might have leaked national secrets to foreign parties. The court rejected all the defences of the defendants and found that their actions were malicious. Ruslan, Perkasa and Ibrahim Ali appealed against the verdict. The Court of Appeal ('COA') agreed with the trial court's findings on liability but reduced the damages awarded against Ruslan, Ibrahim Ali and Perkasa to RM50,000 as general damages and disallowed aggravated damages. Despite

making those findings, the COA dismissed LGE's claim on the ground that he had no locus standi to sue for defamation in his official capacity as Chief Minister of Penang. The COA relied upon its previous similar decision in *Utusan Melayu (M) Bhd v Dato' Sri DiRaja Hj Adnan bin Hj Yaakob* [2016] 5 MLJ 56 ('Adnan Yaakob') where it had accepted and applied the principle in *Derbyshire County Council v Times Newspapers Ltd and others* [1993] 1 All ER 1011 ('Derbyshire') which propounded that democratically-elected government authorities and holders of public office should be open to public criticism in respect of their official affairs and could not, on public policy grounds, sue for defamation in their official capacities. LGE was granted leave to file the instant appeals against the COA's decision on the question whether the Federal Court's decision in *Chong Chieng Jen v Government of State of Sarawak & Anor* [2019] 3 MLJ 300 ('Chong Chieng Jen') allowed a government official to sue for defamation in his/her official capacity. The Federal Court in *Chong Chieng Jen* had held that under s 3 of the Government Proceedings Act 1956 ('the GPA') the Sarawak State Government had the right to commence any form of civil proceedings, including defamation, and such statutory right could not be abrogated by application of the *Derbyshire* principle which was based on English common law. LGE argued that since *Chong Chieng Jen* allowed a governmental authority to sue for defamation, then, by extension, he as a public official should have the similar right. Despite putting forth that argument, LGE at the same time maintained that in the instant case he had sued in his personal capacity and not as the Chief Minister of Penang. The respondents contended that since the COA had found as a fact that LGE had sued in his official capacity, he should have been represented in the court proceedings by a government legal officer, as required by the GPA, and not by a private legal practitioner as LGE had chosen to do. The respondents argued that LGE's failure to comply with the GPA in this regard rendered the proceedings null and void. The respondents also submitted that *Chong Chieng Jen* had no application in the instant matter as it concerned the Sarawak State Government and not a public officer.

Held, by majority, allowing the appeal, setting aside the COA's decision and restoring the High Court's decision:

(1) **(per Abdul Rahman Sebli FCJ, dissenting)** The Federal Court's decision in *Chong Chieng Jen* allowed a government official to sue for defamation in his or her official capacity (see para 4).

(2) **(per Abdul Rahman Sebli FCJ, dissenting)** The views expressed in paras [144], [174], [175] and [176] of the majority judgment in this appeal suggesting that government could not in law commence action for damages against its citizens went contrary to the Federal Court's decision in *Chong Chieng Jen*, which decided otherwise (see para 3).

(3) **(per Abdul Rahman Sebli FCJ, dissenting)** Having taken the position

that he had sued in his official capacity, LGE could not now say that he had sued in his personal capacity as a private citizen and not in his official capacity as the Chief Minister of Penang. He could not approbate and reprobate. He had clearly represented that he was suing as the Chief Minister of Penang and this could be seen in paras 1 and 20 of his statement of claim, his witness statement dated 17 February 2014, para 1 of the statement of agreed facts, his notice of appeal and amended memorandum of appeal and in the leave question posed to this court which was premised on the fact that he had sued in his official capacity as Chief Minister of Penang. The evidence taken in its entirety showed beyond doubt that the defamatory statements were directed at LGE in his official capacity as Chief Minister of Penang and not in his personal capacity as a private citizen. Concerned that his reputation as Chief Minister had been damaged, LGE's suit was to vindicate his reputation in that capacity and not to vindicate his personal reputation as a private citizen (see paras 2, 5–12, 24 & 30–31).

(4) **(per Abdul Rahman Sebli FCJ, dissenting)** LGE did not appeal against the Court of Appeal's unanimous finding that he had sued in his official capacity. He must therefore be taken to have accepted that finding as the truth and was estopped from saying otherwise. His appeal was only against that part of the COA's decision which held that he had no locus standi to bring a claim for defamation in his official capacity as the Chief Minister of Penang. Since LGE chose to pursue his appeal on the premise (by not amending the leave question) that he had sued in his official capacity, it was not permissible for this court to go outside the parameters of the question for which leave had been granted. What LGE was now doing was to abandon the leave question altogether and to ask this court to decide the appeal on an entirely different question for which no leave had been granted. Although this court, being the court of last resort, had discretion to permit an appellant to argue a ground which fell outside the scope of the leave question in order to avoid a miscarriage of justice, the discretion had to be exercised judiciously and sparingly and not capriciously. There was no justification for this court to exercise its discretion in favour of allowing LGE to pursue his appeal on an entirely new ground when there was no application either to amend or modify the leave question or to argue a new point that was outside the purview of the leave question (see paras 10–11 & 16–19).

(5) **(per Abdul Rahman Sebli FCJ, dissenting)** Pursuant to s 24(2)(a) of the GPA, a government officer who sued or was sued in his official capacity could only be represented by a government legal officer, unless the subject-matter of the suit concerned a personal matter in which case the officer could be represented by a private law practitioner of his choice. The use of the word 'may' instead of 'shall' in that section did not mean that a government officer was free to engage a private law practitioner of

his choice to represent him in any civil proceedings unless it concerned a private and personal subject-matter. The word 'may' must be construed to mean that other than a government legal officer, a private law practitioner may not act as advocate for a government officer unless he was authorised by s 24(3) of the GPA to do so. The exclusive right given by s 35(1) of the Legal Profession Act 1976 to a private law practitioner to appear and plead in any Malaysian court was 'subject to' s 24(2)(a) of the GPA (see paras 29, 37, 40 & 42–44).

(6) **(per Abdul Rahman Sebli FCJ, dissenting)** Since LGE had failed to fulfill the requirements of s 24(2)(a) and (3) of the GPA, when he appointed a private legal practitioner to represent him in the action instead of being represented by a government legal officer as required by law, he was not properly represented and it followed that the writ and statement of claim including all cause papers filed on his behalf by his advocate were illegal and ought to be disregarded by the court, including this court. This court, being the apex court, could not turn a blind eye to LGE's breach of the law. Nor could the breach be trivialised as a mere technicality not affecting the justice of the case on the ground that liability had been proven against the respondents. It was a serious transgression of the law that had the effect of nullifying the whole action filed by LGE (see paras 53, 55 & 57).

(7) **(per Harmindar Singh FCJ, majority)** A public officer when suing as an individual, whether he was suing in his official or personal capacity, was not prohibited from bringing an action for damages for defamation. In the instant case, the COA erred in deciding that public officials were precluded in the public interest from bringing a defamation action in their official capacity or in relation to matters affecting their official functions. A public official must enjoy the same rights as other citizens and be allowed to sue for damages for defamation in an individual capacity whether in relation to personal or official matters without having to avail himself of the provisions of the Government Proceedings Act 1956 (see paras 168 & 195).

(8) **(per Harmindar Singh FCJ, majority)** The pleadings indicated that the action was brought by LGE personally and not in his official capacity as Chief Minister. LGE had sued as a private citizen and not by the office of the Chief Minister or the Government of the State of Penang. It was not the Office of the Chief Minister or the state government which had instituted the suit. The impugned statements had named LGE and specifically referred to his disloyalty to the country both as Chief Minister and as a citizen. The sting of the statements was more a criticism of LGE rather than of his office or the Penang State Government. He was the one who had the capacity to divulge the secrets. LGE was therefore not

disentitled from bringing the action as an individual to protect his reputation (see paras 91–92 & 97). A

(9) **(per Harmindar Singh FCJ, majority)** The provisions of the Government Proceedings Act 1956 did not affect LGE since he did not sue in his official capacity. In any case, the relevant provisions of the GPA could not be construed to mean that a public officer was compelled to be represented by a legal officer. The words 'a legal officer may appear' made this plain and unambiguous. It was a privilege given to a public officer to be represented by a legal officer as all expenses would be settled by the government especially in a case involving vicarious liability of the government. But a public officer involved in civil proceedings in his personal capacity enjoyed no such privilege unless the attorney general certified in writing that it was in the public interest to do so. It was therefore a matter between the government and the public official and it was for the government to take up the issue if it considered that its rights were in any way affected. It was not open to third parties like the respondents to challenge this arrangement and decide for LGE as to who should represent him. In any case, the respondents were not prejudiced in any way. For all these reasons, including notably the fact that this issue was neither pleaded not argued in the courts below, the respondents submissions in this regard were misconceived and without merit (see paras 101, 103 & 106). B C D E

(10) **(per Harmindar Singh FCJ, majority)** It was anathema to a modern constitutional democracy to permit elected government authority to commence actions for damages for defamation against its citizens for the simple reason that it was those citizens who decided on that government or authority being placed in power. In other words, an elected governmental institution owed its very survival to those voting citizens and to the process bringing about its existence. In similar vein, it was incompatible that government litigation against its own citizens be funded by those very citizens who contributed to their coffers. If, however, the impugned defamatory publications actually identified individuals in government in their attacks rather than being blanket critiques of government policy or action per se, then those individuals so identified had every right to commence actions in their personal capacities if their reputations had been affected as a result. So, no distinction was drawn between a public officer being defamed for conduct in his official capacity and his personal capacity. As long as the defamatory statement was capable of being read as referring to the individual and not the government body as a whole, the individual officer was entitled to sue. The cases demonstrated quite plainly that individual reputations, whether in their official or personal capacity, were all deserving of protection (see paras 144–145 & 158). F G H I

(11) **(per Harmindar Singh FCJ, majority)** The Federal Court's decision in *Chong Chieng Jen* was not applicable to the instant proceedings. That case was about the right of the Sarawak State Government to sue for defamation. The present case was about an individual's right, albeit a public official, to bring such proceedings. The considerations that applied were not the same. In practice, it would be both remarkable and awkward for both the government and the public officer to sue for the same libel. Hence, *Chong Chieng Jen* offered no assistance to LGE and was irrelevant (see para 178).

(12) **(per Harmindar Singh FCJ, majority)** Aggravated damages could be justified in a variety of circumstances and were not confined to cases involving high-handedness or oppressive action. In the instant case, false allegations of the most serious kind were levelled at LGE who was holding the position of Chief Minister. He was alleged to have revealed national secrets to a foreign government or, in short, committed treason. Both the Courts below found that the allegations made against LGE were false and defamatory. In the circumstances, the High Court was more than justified in awarding compensatory and aggravated damages of RM150,000 against the respondents, which was not manifestly excessive (see paras 191–193).

[Bahasa Malaysia summary

Perayu dalam rayuan-rayuan semasa, Lim Guan Eng ('LGE'), pada masa yang material adalah Ketua Menteri Pulau Pinang. Rayuan pertama, yang melibatkan responden Ruslan Kassim ('Ruslan') telah ditarikbalik dan dibatalkan kerana Ruslan telah meninggal dunia sebelum rayuan tersebut didengar. Responden dalam rayuan kedua adalah parti politik, Pertubuhan Pribumi Perkasa Malaysia ('Perkasa') dan presidennya ketika itu, Ibrahim Ali. Pada bulan Ogos 2011, LGE melakukan lawatan rasmi dua hari ke Singapura untuk tujuan menarik pelaburan dan pelancongan perubatan ke Pulau Pinang. Dalam lawatan tersebut, beliau telah menghadiri makan malam bersama beberapa ahli politik Singapura. Ruslan, pada masa tersebut merupakan ketua pegawai maklumat Perkasa, mengeluarkan kenyataan media — yang telah disiarkan di beberapa akhbar utama — yang mendakwa LGE telah menghadiri 'pertemuan sulit' dengan ahli politik dari parti pemerintah Singapura, PAP, dan bahawa rakyat Malaysia berhak mengetahui apa yang dibincangkan dalam perjumpaan tersebut. Kenyataan media itu antara lain mempersoalkan kesetiaan LGE kepada Malaysia. LGE menyaman Ruslan, Perkasa, Ibrahim Ali dan surat khabar tersebut atas memfitnah. Setelah perbicaraan penuh, Mahkamah Tinggi membenarkan tuntutan LGE dan, antara lain, memerintahkan Ruslan, Ibrahim Ali dan Perkasa membayar LGE RM150,000 sebagai ganti rugi am dan teruk. Mahkamah perbicaraan mendapati bahawa kenyataan yang dibuat/diterbitkan oleh defendan yang mempertikaikan kesetiaan LGE sebagai Ketua Menteri dan warganegara Malaysia dan

memberikan gambaran bahawa beliau mungkin telah membocorkan rahsia negara kepada pihak asing. Mahkamah menolak kesemua pembelaan defendan dan mendapati bahawa tindakan mereka adalah berniat jahat. Ruslan, Perkasa dan Ibrahim Ali merayu terhadap keputusan tersebut. Mahkamah Rayuan ('MR') bersetuju dengan dapatan mahkamah perbicaraan ke atas liabiliti namun telah mengurangkan ganti rugi yang diberikan terhadap Ruslan, Ibrahim Ali dan Perkasa kepada RM50,000 sebagai ganti rugi am dan menolak ganti rugi teruk. Meskipun membuat dapatan tersebut, MR menolak tuntutan LGE dengan alasan bahawa beliau tidak mempunyai locus standi untuk menyaman atas memfitnah berdasarkan kapasiti rasminya sebagai Ketua Menteri Pulau Pinang. MR bergantung pada keputusannya yang serupa sebelum ini dalam *Utusan Melayu (M) Bhd v Dato' Sri DiRaja Hj Adnan bin Hj Yaakob* [2016] 5 MLJ 56 ('Adnan Yaakob') di mana ia telah menerima dan menggunapakai prinsip dalam *Derbyshire County Council v Times Newspapers Ltd and others* [1993] 1 All ER 1011 ('Derbyshire') yang menyatakan bahawa kerajaan pemerintah yang dipilih secara demokratik dan pemegang jawatan awam harus terbuka terhadap kritikan masyarakat berkenaan dengan urusan rasmi mereka dan tidak dapat, atas dasar awam, menyaman atas fitnah berdasarkan kapasiti rasmi mereka. LGE diberikan kebenaran untuk memfailkan rayuan semasa terhadap keputusan MR berdasarkan persoalan sama ada keputusan Mahkamah Persekutuan dalam *Chong Chieng Jen v Government of State of Sarawak & Anor* [2019] 3 MLJ 300 ('Chong Chieng Jen') membenarkan pegawai kerajaan untuk menyaman kerana fitnah atas kapasiti rasminya. Mahkamah Persekutuan di *Chong Chieng Jen* telah memutuskan bahawa di bawah s 3 Akta Prosiding Kerajaan 1956 ('APK') Kerajaan Negeri Sarawak berhak untuk memulakan segala bentuk prosiding sivil, termasuk fitnah, dan hak undang-undang tersebut tidak boleh dibatalkan dengan menggunapakao prinsip *Derbyshire* yang berdasarkan English common law. LGE berpendapat bahawa oleh kerana *Chong Chieng Jen* membenarkan kerajaan pemerintah untuk menyaman kerana fitnah, maka, secara kesinambungan, beliau sebagai pegawai awam harus memiliki hak yang serupa. Walaupun mengemukakan hujah tersebut, LGE pada masa yang sama menyatakan bahawa dalam kes semasa beliau telah menuntut atas kapasiti peribadinya dan bukan sebagai Ketua Menteri Pulau Pinang. Responden berpendapat bahawa oleh kerana MR telah membuat dapatan fakta bahawa LGE telah menuntut atas kapasiti rasminya, beliau seharusnya diwakili dalam prosiding mahkamah oleh pegawai undang-undang kerajaan, seperti yang ditetapkan oleh APK, dan bukan oleh pengamal undang-undang swasta sepertimana yang telah dipilih oleh LGE. Responden berpendapat bahawa kegagalan LGE untuk mematuhi APK dalam hal ini menjadikan prosiding tersebut terbatal dan tidak sah. Responden juga menyatakan bahawa *Chong Chieng Jen* tidak terpakai dalam hal semasa kerana ia berkaitan dengan Kerajaan Negeri Sarawak dan bukan pegawai awam.

Diputuskan, berdasarkan majoriti, membenarkan rayuan, mengetepikan

keputusan MR dan mengekalkan keputusan Mahkamah Tinggi:

(1) **(oleh Abdul Rahman Sebli HMP, menentang)** Keputusan Mahkamah Persekutuan dalam *Chong Chieng Jen* membenarkan pegawai kerajaan untuk menyaman kerana fitnah atas kapasiti rasminya (lihat perenggan 4).

(2) **(oleh Abdul Rahman Sebli HMP, menentang)** Pandangan yang dinyatakan dalam perenggan [144], [174], [175] dan [176] dalam penghakiman majoriti dalam rayuan ini menunjukkan bahawa kerajaan tidak seharusnya berdasarkan undang-undang memulakan tindakan bagi ganti rugi terhadap rakyatnya yang bertentangan dengan keputusan Mahkamah Persekutuan. dalam *Chong Chieng Jen*, yang memutuskan sebaliknya (lihat perenggan 3).

(3) **(oleh Abdul Rahman Sebli HMP, menentang)** Setelah mengambil posisi bahawa beliau telah menyaman atas kapasiti rasminya, LGE sekarang tidak dapat mengatakan bahawa beliau telah menyaman atas kapasiti peribadinya sebagai rakya persendirian dan bukan dalam kapasiti rasminya sebagai Ketua Menteri Pulau Pinang. Beliau tidak boleh menerima dan menolak. Beliau telah dengan jelas memberikan representasi bahawa beliau menyaman sebagai Ketua Menteri Pulau Pinang dan ini dapat dilihat dalam perenggan 1 dan 20 pernyataan tuntutannya, pernyataan saksi bertarikh 17 Februari 2014, perenggan 1 dari penyataan fakta yang dipersetujui, notis rayuan dan memorandum rayuan terpinda dan dalam persoalan kebenaran merayu yang dikemukana ke mahkamah ini yang didasarkan kepada fakta bahawa beliau telah menuntut atas kapasiti rasminya sebagai Ketua Menteri Pulau Pinang. Bukti-bukti yang diambil secara keseluruhan menunjukkan bahawa melangkaui keraguan bahawa kenyataan fitnah tersebut ditujukan kepada LGE dalam kapasiti rasminya sebagai Ketua Menteri Pulau Pinang dan bukan atas kapasiti peribadinya sebagai rakyat persendirian. Bimbang bahawa reputasinya sebagai Ketua Menteri telah rosak, tuntutan LGE adalah untuk membersihkan reputasinya dalam kapasiti tersebut dan bukan untuk membersihkan reputasi peribadinya sebagai rakyat persendirian (lihat perenggan 2, 5–12, 24 & 30–31).

(4) **(oleh Abdul Rahman Sebli HMP, menentang)** LGE tidak merayu terhadap keputusan sebulat suara Mahkamah Rayuan bahawa beliau telah menyaman atas kapasiti rasminya. Beliau dengan itu harus menerima bahawa dapatan tersebut sebagai kebenaran dan di-estop dari menyatakan sebaliknya. Rayuan beliau hanya terhadap sebahagian keputusan MR yang menyatakan bahawa beliau tidak mempunyai locus standi untuk mengemukakan tuntutan fitnah dalam kapasiti rasmi beliau sebagai Ketua Menteri Pulau Pinang. Oleh kerana LGE memilih untuk meneruskan rayuannya berdasarkan premis (dengan tidak meminda soalan kebenaran merayu) bahawa beliau menyaman atas kapasiti

rasminya, maka mahkamah ini tidak dibenarkan terpesong dari parameter persoalan yang mana kebenaran merayu dibenarkan. Apa yang LGE sekarang lakukan adalah dengan mengabaikan persoalan kebenaran merayu sama sekali dan memohon mahkamah ini memutuskan rayuan tersebut atas persoalan yang sama sekali berbeza dengan kebenaran merayu. Walaupun mahkamah ini, adalah mahkamah terakhir, mempunyai budi bicara untuk membenarkan perayu untuk menghujahkan alasan yang berada di luar skop persoalan kebenaran untuk mengelakkan ketidakadilan, budi bicara tersebit harus dilaksanakan dengan bijaksana dan berhemat dan tidak berubah-ubah. Tidak ada justifikasi untuk mahkamah ini menggunakan budi bicaranya untuk membenarkan LGE meneruskan rayuannya dengan alasan yang sama sekali baru apabila tidak ada permohonan untuk meminda atau mengubah persoalan kebenaran atau untuk berhujah mengenai perkara baru yang berada di luar skop soalan kebenaran merayu (lihat perenggan 10–11 & 16–19).

(5) **(oleh Abdul Rahman Sebli HMP, menentang)** Menurut s 24(2)(a) APK, seorang pegawai kerajaan yang menyaman atau disama dalam kapasiti rasminya hanya dapat diwakili oleh pegawai undang-undang kerajaan, kecuali sekiranya perkara utama tuntutan tersebut adalah berkaitan perkara peribadi di mana pegawai tersebut boleh diwakili oleh pengamal undang-undang swasta pilihannya. Penggunaan perkataan 'boleh' dan bukan 'harus' dalam seksyen tersebut tidak bermaksud bahawa pegawai kerajaan bebas untuk melantik pengamal undang-undang persendirian pilihan untuk mewakilinya dalam mana-mana prosiding sivil melainkan ia melibatkan perkara utama peribadi dan persendirian. Perkataan 'boleh' mesti ditafsirkan bermaksud bahawa selain daripada pegawai undang-undang kerajaan, pengamal undang-undang swasta tidak boleh bertindak sebagai peguamcara pegawai kerajaan melainkan beliau diberi kuasa oleh s 24(3) APK untuk berbuat demikian. Hak eksklusif yang diberikan oleh s 35(1) Akta Profesion Undang-Undang 1976 kepada pengamal undang-undang swasta untuk hadir dan memplidkan di mana-mana mahkamah Malaysia adalah 'tertakluk kepada s 24(2)(a) APK (lihat perenggan 29, 37, 40 & 42–44).

(6) **(oleh Abdul Rahman Sebli HMP, menentang)** Oleh kerana LGE telah gagal memenuhi pra-syarat ss 24(2)(a) dan 24(3) APK, apabila beliau melantik seorang pengamal undang-undang swasta untuk mewakilinya dalam tindakan tersebut dari diwakili oleh pegawai undang-undang kerajaan seperti yang ditetapkan oleh undang-undang, beliau tidak diwakili dengan wajar dan diikuti bahawa writ dan pernyataan tuntutan termasuk kesemua kertas kausa yang difailkan bagi pihaknya oleh peguamcara adalah tidak sah dan harus diabaikan oleh mahkamah, termasuk mahkamah ini. Mahkamah ini, sebagai mahkamah agung,

tidak dapat menutup mata terhadap pelanggaran undang-undang oleh LGE. Juga pelanggaran itu tidak boleh dipandang remeh sebagai teknikal semata-mata tidak mempengaruhi keadilan kes dengan alasan bahawa liabiliti telah dibuktikan terhadap responden. Ini adalah pelanggaran undang-undang yang serius yang mengakibatkan pembatalan keseluruhan tindakan yang difailkan oleh LGE (lihat perenggan 53, 55 & 57).

(7) **(oleh Harmindar Singh HMP, majoriti)** Seorang pegawai awam apabila menyaman sebagai individu, sama ada beliau menyaman atas kapasiti awam atau peribadi beliau, tidak dihalang dalam membawa tindakan ganti rugi atas fitnah. Dalam kes semasa, MR terkhilaf dalam memutuskan bahawa pegawai awam dihalang atas kepentingan awam daripada membawa tindakan fitnah atas kapasiti rasmi mereka atau berkaitan dengan perkara yang mempengaruhi fungsi rasmi mereka. Pegawai awam mesti menikmati hak yang sama dengan rakyat lain dan dibenarkan untuk menyaman bagi ganti rugi atas fitnah dalam kapasiti individu sama ada berkaitan dengan perkara peribadi atau rasmi tanpa harus memanfaatkan peruntukan Akta Prosiding Kerajaan 1956 (lihat perengan 168 & 195).

(8) **(oleh Harmindar Singh HMP, majoriti)** Pliding menunjukkan bahawa tindakan tersebut dibawa oleh LGE secara pribadi dan bukan dalam kapasiti rasminya sebagai Ketua Menteri. LGE telah menuntut sebagai warganegara persendirian dan bukan oleh pejabat Menteri Besar atau Kerajaan Negeri Pulau Pinang. Ianya bukan Pejabat Menteri Besar atau Kerajaan Negeri yang memulakan tuntutan tersebut. Kenyataan yang didakwa menamakan LGE dan secara spesifik merujuk kepada ketidaksetiaannya kepada negara baik sebagai Ketua Menteri dan sebagai warga negara. Kesan kenyataan tersebut lebih merupakan kritikan terhadap LGE berbanding jawatan atau Kerajaan Negeri Pulau Pinang. Beliau yang memiliki kemampuan untuk membocorkan rahsia. Oleh itu, LGE tidak dihalangkan hak untuk membawa tindakan tersebut sebagai individu untuk melindungi reputasinya (lihat perenggan 91–92 & 97).

(9) **(oleh Harmindar Singh HMP, majoriti)** Peruntukan Akta Prosiding Kerajaan 1956 tidak memberi kesan kepada LGE kerana beliau tidak menyaman atas kapasiti rasmi beliau. Dalam hal apa pun, peruntukan APK yang relevan tidak seharusnya ditafsirkan membawa makna bahwa seorang pegawai awam haruslah diwakili oleh pegawai undang-undang. Perkataan 'pegawai undang-undang boleh hadir' menjadikannya jelas dan nyata. Ianya merupakan suatu keistimewaan yang diberikan kepada pegawai awam untuk diwakili oleh pegawai undang-undang kerana kesemua perbelanjaan akan ditanggung oleh kerajaan terutamanya dalam hal yang melibatkan liabiliti vikarius kerajaan. Tetapi pegawai awam yang terlibat dalam prosiding sivil atas kapasiti peribadinya tidak

mendapat hak istimewa tersebut kecuali peguam negara mengesahkan secara bertulis bahawa ianya adalah kepentingan awam untuk berbuat demikian. Oleh itu, ini adalah perkara antara kerajaan dan pegawai awam dan adalah selayaknya kerajaan harus membawa isu tersebut sekiranya ia menganggap haknya terjejas sama sekali. Ianya tidak terbuka bagi pihak ketiga seperti responden untuk mencabar aturan ini dan memutuskan LGE mengenai siapa yang harus mewakilinya. Walau apa pun, responden tidak diprejudiskan. Atas kesemua alasan ini, termasuk terutama fakta bahawa isu ini tidak diplidkan untuk tidak dihujahkan di mahkamah bawahan, pendapat responden dalam hal ini salah anggap dan tanpa merit (lihat perenggan 101, 103 & 106).

(10) **(oleh Harmindar Singh HMP, majoriti)** Ianya adalah menjadi anathema kepada demokrasi perlembagaan moden untuk membenarkan badan kerajaan yang dipilih untuk memulakan tindakan ganti rugi atas fitnah terhadap warganya dengan alasan mudah bahawa warganegara tersebut yang memutuskan bagi pemerintah atau pihak berkuasa untuk memerintah. Dengan erti kata lain, sebuah institusi pemerintah yang dipilih bergantungan atas kelangsungannya kepada mereka yang memilih dan proses yang memberikannya kuasa. Dalam hal yang sama, ianya adalah tidak bersesuaian bahawa perbicaraan oleh kerajaan terhadap warganya sendiri dibiayai oleh mereka yang memberikan sumbangan kepada saku mereka. Jika, sekiranya, penerbitan dakwaan fitnah tersebut benar-benar mengenal pasti individu-individu dalam kerajaan dalam serangan mereka daripada menjadi kritikan menyeluruh terhadap dasar atau tindakan kerajaan itu sendiri, maka individu-individu yang dikenal pasti mempunyai hak untuk memulakan tindakan dengan kapasiti peribadi mereka jika reputasi mereka terjejas. Oleh itu, tidak ada perbezaan antara pegawai awam yang difitnah atas tingkah laku dalam kapasiti rasmi dan kapasiti peribadi beliau. Selagi pernyataan fitnah itu dapat dibaca merujuk kepada individu dan bukan badan kerajaan secara keseluruhan, pegawai tersebut berhak menyaman. Kes-kes tersebut menunjukkan dengan jelas bahawa reputasi individu, baik dalam kapasiti rasmi atau pribadi mereka, semuanya layak mendapat perlindungan (lihat perengan 144–145 & 158).

(11) **(oleh Harmindar Singh HMP, majoriti)** Keputusan Mahkamah Persekutuan dalam *Chong Chieng Jen* tidak terpakai kepada prosiding semasa. Kes tersebut adalah mengenai hak Kerajaan Negeri Sarawak untuk menyaman kerana fitnah. Kes semasa adalah berkenaan hak seseorang, walaupun pegawai awam, untuk membawa prosiding sedemikian. Pertimbangan yang digunapakai adalah tidak sama. Secara praktisnya, ianya akan menjadi luar biasa dan janggal bagi kerajaan dan pegawai awam untuk menyaman bagi fitnah yang sama. Oleh itu, *Chong Chieng Jen* tidak menawarkan sebarang bantuan kepada LGE dan tidak relevan (lihat perenggan 178).

(12) **(oleh Harmindar Singh HMP, majoriti)** Ganti rugi teruk dapat dijustifikasikan dalam pelbagai keadaan dan tidak terbatas kepada kes yang melibatkan tindakan tinggi atau tindakan menindas. Dalam kes semasa, tuduhan palsu yang paling serius diajukan kepada LGE yang memegang jawatan Ketua Menteri. Beliau didakwa telah mendedahkan rahsia negara kepada kerajaan asing atau, pendek kata, melakukan pengkhianatan. Kedua-dua Mahkamah bawahan mendapati bahawa tuduhan yang dibuat terhadap LGE adalah palsu dan bersifat memfitnah. Dalam keadaan seperti itu, mahkamah Tinggi lebih wajar dalam membenarkan pemberian pampasan dan ganti rugi teruk sebanyak RM150,000 terhadap responden, yang nyata tidak berlebihan (lihat perenggan 191–193).]

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Appeal from: Civil Appeal Nos W-02(NCVC)(A)-695–04 of 2015 and W-02(NCVC)(A)-696–04 of 2015 (Court of Appeal, Putrajaya)

Americk Sidhu (Americk Sidhu) for the appellant.
Adnan bin Saman @ Abdullah (Adnan Sharida & Assoc) for the respondents.

Abdul Rahman Sebli FCJ (delivering dissenting judgment of the court):

[1] The salient facts have been set out by my learned brother Justice Harmindar Singh Dhaliwal in his judgment and I have nothing to add. The sole and only question of law for this court's determination is as follows:

> Does the decision of the Federal Court in *Chong Chieng Jen v Government of State of Sarawak & Anor* [2019] 3 MLJ 300; [2019] 1 CLJ 329 allow a Government Official to sue for defamation in his or her official capacity bearing in mind the decision in

Derbyshire County Council v Times Newspapers Ltd and others [1993] 1 All ER 1011, not being applicable under Malaysian law? A

[2] Quite clearly the factual premise of the leave question is that the appellant had sued in his official capacity and not in his personal capacity. It is an implied admission by the appellant that he had sued in his official capacity as the Chief Minister of Penang. What he now wants this court to determine is whether, as a matter of law, he could sue for defamation in that official capacity. B

[3] For reasons given by my learned brother Justice Harmindar Singh Dhaliwal in his illuminating judgment, I am in full agreement that a government officer can sue for defamation in his official capacity, except that I am unable to agree, with regret, with paras [144], [174], [175] and [176] of the judgment which suggest, albeit by way of obiter, that the government cannot in law commence action for damages against its citizens. Apparently this court in *Chong Chieng Jen v Government of State of Sarawak & Anor* [2019] 3 MLJ 300; [2019] 1 CLJ 329 (*Chong Chieng Jen*) had decided otherwise. I have no reason to depart from that decision. C D

[4] Since the factual premise of the leave question is that the appellant had sued in his official capacity, the question has to be answered in the affirmative, that is to say, the decision of this court in *Chong Chieng Jen* does allow a government official to sue for defamation in his or her official capacity. E

[5] But that is not the end of the matter. Having taken the position that he had sued in his official capacity, the appellant cannot now be heard to say, as he is now saying, that he had sued in his personal capacity as a private citizen and not in his official capacity as the Chief Minister of Penang. With due respect, the appellant cannot approbate and reprobate. F G

[6] In any event, by pleading and making the point in para 1 of his statement of claim that he was the Chief Minister of Penang at the material time, it is obvious that the appellant's primary concern was to protect his reputation as the Chief Minister of Penang and the reputation of the State Government of Penang that he was heading, and not so much his personal reputation as a private citizen. H

[7] The clear representation that he made was that he was suing as the Chief Minister of Penang and not in his personal capacity as a private citizen. This can be seen first of all from para 20 under the heading 'Particulars of Malice' of his statement of claim where he pleaded as follows: I

> III. Bearing in mind the fact that the Plaintiff, *as the Chief Minister of Penang, commands a high degree of respect due to his governments performance during his term*

as Chief Minister, it has become imperative for the Barisan Nasional coalition to do all it can to tarnish the Plaintiff's good name in the hope this will entice voters to vote for the Plaintiff out of office in the next General Election.

[8] In his witness statement dated 17 February 2014, the appellant gave his address as *Chief Minister's Office, Level 28, KOMTAR, 10502 Penang.* Obviously that was his official address as the Chief Minister of Penang and not his personal address.

[9] Paragraph 1 of the statement of agreed facts is further proof that the appellant had sued in his official capacity as the Chief Minister of Penang. This is what the parties had agreed to:

The Plaintiff is the Chief Minister of the State of Penang, the elected Member of Parliament for Bagan, the State Assemblyman for Air Puteh and the Secretary General of the Democratic Action Party, Malaysia.

[10] In any case, whether the appellant had sued in his official capacity or in his personal capacity is a question of fact. In this regard, the Court of Appeal was unanimous in finding that the appellant had sued in his official capacity. The appellant did not appeal against this finding. He must therefore be taken to accept the finding as the truth and is estopped from saying otherwise.

[11] It is important to bear in mind that the appellant's appeal before this court is only against that part of the Court of Appeal's decision that decided that he had no locus standi to bring a claim for defamation, being the Chief Minister of Penang, in his official capacity. This is clear from the appellant's notice of appeal dated 17 February 2019, which reads:

AMBIL PERHATIAN bahawa Lim Guan Eng, Perayu yang dinamakan di atas yang tidak berpuas hati dengan keputusan yang diberikan oleh Mahkamah Rayuan pada 21 haribulan Disember 2016, merayu kepada Mahkamah Persekutuan terhadap sebahagian daripada keputusan yang mendapati bahawa Perayu tidak mempunyai locus standi untuk membawa tindakan asal *dalam kapasiti rasminya.*

[12] This is repeated in the appellant's amended memorandum of appeal dated 3 February 2020 where the opening paragraph reads as follows:

Lim Guan Eng, the Appellant abovenamed having obtained leave to appeal on the 11th day of July 2009, appeals to the Federal Court against that part of the decision of the Court of Appeal given at Putrajaya on the 21st day of December 2016 which held that the Appellant had no locus standi to bring a claim for defamation, being the Chief Minister of the State of Penang, *in his official capacity* ...

[13] Both the notice of appeal and the amended memorandum of appeal were filed post-*Chong Chieng Jen*. It is therefore reasonable to assume that by

then the solicitor who filed the two documents on behalf of the appellant would have been aware of the decision in that case (hence the leave question), including in particular the following obiter observation by this court:

> [32] Although in *Derbyshire* no individual was a party to the claim and thus, the right of individual officers or employees of the organs of Government to sue for defamation was not directly in issue in the case, in the aforesaid speech Lord Keith acknowledged the fact that an individual can sue for defamation:
>
> > Reputation in the eyes of the public is more likely to attach itself to the controlling party, and with a change in that party the reputation itself will change. A publication attacking the activities of the authority will necessarily be an attack on the body of councilors which represents the controlling party, or on the executives who carry on the day to day management of its affairs. If the individual reputation of any of these is wrongly impaired by the publication any of these can himself bring proceedings for defamation. Further, it is open to the controlling body to defend itself by public utterances and in debate in the council chamber.'

[14] Thus, at the time the appellant filed the leave application, he must have reasonably expected the leave question to be answered in his favour by this court. That is probably the reason why no attempt was made to amend the leave question or to substitute it with another question at the hearing before us. It was to use *Chong Chieng Jen* to the appellant's advantage as the decision in that case readily provides an affirmative answer to the question.

[15] The appellant would also have been aware that this court in *Chong Chieng Jen* did not disapprove of the following observations by the Court of Appeal (*Government of the State of Sarawak & Anor v Chong Chieng Jen* [2016] 3 MLJ 41; [2016] 5 CLJ 169), from which the appeal emanated:

> [100] The statutory right of the State Government to sue for defamation is independent of the right of any member of the administration, including the Chief Minister to sue in his own name and in his personal capacity.
>
> [101] If any of them were to sue in that capacity, it will then be an action between private citizens and not between government and citizen. Such action does not involve the affairs of the State. It is purely a private and personal matter. An example would be where a member of the State administration is wrongly accused of being a thief, and it does not matter if he is accused of stealing government money or money belonging to a private citizen. It is still a private and personal matter between the accuser and the accused.

[16] Since the appellant had chosen to pursue his appeal on the premise that he had sued in his official capacity by retaining the leave question despite having the opportunity to amend it, I do not think it is permissible for this court to travel outside the perimeters of the question. That will defeat the whole purpose of s 96 of the Courts of Judicature Act 1964, which requires for

leave to be obtained first. The section provides as follows:

> 96 Conditions of appeal
>
> Subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal, an appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court —
>
> (a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction involving a question of general importance upon which further argument and a decision of the Federal Court would be to the public advantage; or
>
> (b) from any decision as to the effect of any provision of the Constitution including the validity of any written law relating to any such provision.

[17] The judgment of the Court of Appeal from which the present appeal emanates was to set aside the decision of the High Court on the ground that the appellant had no locus standi to sue the respondents in his official capacity as the Chief Minister of Penang. What the appellant is now doing is to abandon the leave question altogether, which relates to that part of the judgment, and instead to ask this court to decide the appeal on an entirely different question for which no leave had been granted to him.

[18] It is true that this court being the court of last resort has a discretion to permit the appellant to argue a ground which falls outside the scope of the leave question in order to avoid a miscarriage of justice but the discretion must be exercised judiciously and sparingly and not capriciously. What needs to be appreciated is that it is not a right for the appellant to pursue his appeal on a question for which no leave had been granted to him.

[19] In the absence of any application by the appellant to amend or to modify the leave question at any time before or at the commencement of the hearing before us, there is no justification for this court to exercise its discretion in favour of allowing the appellant to pursue his appeal on an entirely new ground. The appellant did not even consider it necessary make an oral application to argue on the new point, which is completely outside the purview of the leave question.

[20] What the appellant is now doing is to argue the appeal on an entirely different factual premise, ie that he had sued in his personal capacity as a private citizen, which is a complete deviation from the leave question which is premised on the fact that he had sued in his official capacity as the Chief Minister of Penang.

[21] This must not be countenanced by this court as it will set a dangerous

precedent. In *Melawangi Sdn Bhd v Tiow Weng Theong* [2020] 3 MLJ 677, this is what this court had to say on the matter:

> As we said in the recent case of *Noor Azman Azami v Zahida bt Mohamed Rafik* [2019] 3 MLJ 141; [2019] 3 CLJ 295 as a matter of broad general principle, a party is not precluded from raising a *new issue* in an *appeal* because this court has the power and discretion to permit a party to argue a ground which falls outside the scope of the question regarding which leave to appeal had been granted in order to avoid a miscarriage of justice (see: *Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia* [1999] 2 MLJ 337; [1999] 2 CLJ 471 and *Datuk Harris Mohd Salleh v Datuk Yong Teck Lee (sued in his personal capacity and as an officer of the second respondent) & Anor* [2017] 6 MLJ 133; [2018] 1 CLJ 145). We must add here that the discretion must, however, be exercised judiciously and sparingly, and only in very limited circumstances in order to achieve the ends of justice. It has to be performed with care after giving serious considerations to the interests of all parties concerned.

[22] This appeal must therefore be decided strictly on the basis that the appellant had sued in his official capacity as the Chief Minister of Penang and not in his personal capacity as a private citizen.

[23] Even if the leave question cannot be taken as an implied admission by the appellant that he had sued in his official capacity, the Court of Appeal was not plainly wrong in my view in finding that the appellant had sued in his official capacity.

[24] Putting aside the fact that the appellant did not appeal against this finding, the evidence taken in its entirety shows beyond any doubt that the defamatory statements were directed at the appellant in his official capacity as the Chief Minister of Penang and not in his personal capacity as a private citizen.

[25] As noted by the Court of Appeal, the High Court in finding that defamation had been proved against the respondents, had proceeded on the basis that the appellant was the Chief Minister of Penang. The question of the appellant suing in his personal capacity as a private citizen did not arise.

[26] By way of comparison, the appellants in the Singapore case of *Tang Liang Hong v Lee Kuan Yew & Anor and other appeals* [1998] 1 SLR 97 sued in their personal capacities as private citizens. None of them brought the actions in their official capacities. It was therefore perfectly in order for them to be represented by private law practitioners of their choice.

[27] For the record, the first respondent, Lee Kuan Yew in that case was a Senior Minister in the Prime Minister's Office whilst the second respondent

BG Lee Hsien Loong was the Deputy Prime Minister of Singapore at the material time.

[28] Given the fact that the appellant was a serving Chief Minister at the material time, the suit does not turn into a private suit between private individuals just because the appellant says so, unless he had pleaded and had proceeded with the trial on the basis that he was suing in his personal capacity as a private citizen. By not making his position clear, the appellant cannot now be heard to say that he was suing in both official and personal capacities, whichever suits him.

[29] The question whether the appellant had sued in his personal capacity or in his official capacity is important because under the Government Proceedings Act 1956 ('the GPA'), a government officer who sues or is sued in his official capacity can only be represented by a government legal officer, unless the subject matter of the suit concerns a personal matter in which case the officer can be represented by a private law practitioner of his choice.

[30] In the present case, what was of concern to the appellant was the fact that the defamatory statements had damaged his reputation as the Chief Minister of Penang, the official position that he was holding at the material time and not his personal reputation as a private citizen. This is expressed in his answer to question 19 of his witness statement dated 17 February 2014 where he said:

> A: It has consistently been the strategy of the Barisan Nasional and its connected media to discredit me and *damage my reputation as the Chief Minister of Penang* and Secretary General of the DAP with lies and insinuations in order to advance their political interests in the 13th General Elections to the Federal Parliament and the Penang State Assembly.

[31] In other words, the suit was to vindicate his reputation as the Chief Minister of Penang and not to vindicate his personal reputation as a private citizen. Then in answer to question 21 of the same witness statement, this is what the appellant said:

> A: Yes. I believe the allegations which I have made of malice are the basis upon which the Defendants propagated the disparaging and untrue remarks first published by Ruslan Kassim on the PERKASA website.
>
> I wish to emphasise that none of the Defendants made any attempt to contact me to verify the allegations made by Ruslan Kassim and this can only be regarded as totally irresponsible gutter journalism, *the effects of which would have had far reaching consequences as far as my integrity as a loyal Malaysian citizen and Chief Minister is concerned*.

[32] It is also important to remember that the appellant's action was triggered by the respondents' accusation that he had disclosed official government secrets while on official visit to Singapore in his official capacity as the Chief Minister of Penang and not in his personal capacity as a private citizen on a holiday in the Republic.

[33] To accuse a Chief Minister of disclosing official government secrets while he is on official duty is not accusation of a personal and private nature. It concerns not only the holder of the office but also the office itself. On the facts, it is futile to separate the two entities.

[34] The appellant does not in fact deny that his visit to Singapore was an official visit and that the purpose of the visit was to develop investment potential in Penang and to promote tourism. It was certainly not a private visit. It was on government business. This is confirmed in no uncertain terms by the appellant himself in his witness statement dated 17 February 2014 where he said in answer to question 9 as a follow up to his answer to question 8:

> Q8. Have Datuk Azman, Datuk Seri Kalimullah and yourself ever had dinner with any senior PAP leader in Singapore?
>
> A. No. There has never been any such dinner.
>
> Q9. Not even on the 11–12 August 2011?
>
> A. Definitely not. *On 11–12 August 2011 I was in Singapore on an official programme to promote investment in Penang*. I refer to a press statement issued by my press secretary, at page of the Plaintiffs Further Bundle of Documents (Exhibit).

[35] Having regard to the factual matrix of the case, it is clear that in so far as the appellant's capacity is concerned, the official element is more predominant than the personal element, and there is no dispute that he had all along been represented by a private law practitioner and not by a government legal officer.

[36] Since the appellant had sued in his official capacity as the Chief Minister of Penang as found by the Court of Appeal, as evidenced by his statement of claim, by his own admission in the leave question, by his witness statement, by his notice of appeal and memorandum of appeal, the law required him to be represented by a government legal officer and not by a private law practitioner of his choice.

[37] It is not so much a question of whether a government legal officer is compelled to represent him. It is a requirement of s 24(2)(a) of the GPA, which provides as follows:

A (2) *Notwithstanding any written law* in civil proceedings to which a public officer is a party —

(a) by virtue of his office; or

(b) ...

B *a legal officer may appear as advocate on behalf of such officer* and shall be deemed to be the recognized agent of such officer by whom all appearances, acts and applications in respect of such proceedings may be made or done on behalf of such officer. (Emphasis added.)

C **[38]** The language used in the opening sentence of the subsection is 'Notwithstanding any written law in civil proceedings to which a public officer is a party'. The significance of the choice of words is that being a special provision that deals specifically with proceedings by or against government officers, the provision must prevail over any other written law relating to legal representation in civil proceedings that involve government officers.

[39] The appellant cannot be heard to argue that the provision has no application in the situation that obtains in the present appeal. To accede to the E argument would be to render s 24(2)(a) of the GPA completely redundant and denuded of all meaning.

[40] It is trite principle that Parliament does not legislate in vain. The fact that s 24(2)(a) of the GPA uses the word 'may' instead of the word 'shall' does F not mean that a government officer is free to engage a private law practitioner of his choice to represent him in any civil proceedings unless it concerns a private and personal matter between him and the defendant or the plaintiff as the case may be.

G **[41]** Section 17A of the Interpretation Acts 1948 and 1967 is relevant and it provides:

17A In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would H not promote that purpose or object.

[42] Having regard to the object underlying the GPA and reading s 24(2)(a) harmoniously with s 24(3), the word 'may' in s 24(2)(a) must be construed to I mean that other than a legal officer, a private law practitioner may not act as advocate on behalf of a government officer unless he is authorised by law to do so, in this case by s 24(3) which provides as follows:

(3) An advocate and solicitor of the High Court *duly retained by the Attorney General* in the case of civil proceedings by or against the Federal Government or a Federal

officer, *or by the Legal Adviser*, or, in the case of the States of Sabah and Sarawak, by the State Attorney General in the case of civil proceedings by or against the government of a State *or a State officer*, may appear as advocate on behalf of such government or officer in such proceedings. (Emphasis added.)

[43] Applying the maxim *generalia specialibus non derogant,* the Legal Profession Act 1976 ('the LPA') must give way to the GPA. The provision of the LPA that must give way to s 24(2)(a) of the GPA is s 35(1), which reads:

35 Right of Advocate and Solicitor.

(1) Any advocate and solicitor shall, *subject to this Act and any other written law*, have the exclusive right to appear and plead in all Courts of Justice in Malaysia according to the law in force in those Courts; and as between themselves shall have the same rights and privileges without differentiation.

[44] Clearly therefore, the exclusive right of a private law practitioner to appear and plead in any Malaysian court is 'subject to' s 24(2)(a) of the GPA, which is a special law relating to legal representation involving government officers.

[45] In *Perbadanan Kemajuan Kraftangan Malaysia v DW Margaret a/p David Wilson (t/a Kreatif Kraf)* [2010] 2 MLJ 713; [2010] 5 CLJ 899, a case that involved a body corporate (as opposed to a public officer) suing a private individual, this court touched on s 35(2) of the LPA and observed as follows at p 726 (MLJ); p 912 (CLJ):

Section 35(2) LPA 1976 is also in consonance with the provision of s 24 of the Government Proceedings Act 1956 which prior to the LPA 1976 has also enabled certain categories of officers of the Attorney General's Chambers to appear on behalf of the Government. In addition, in civil proceedings *when duly retained by the Attorney General* it is permissible for an advocate and solicitor to appear on behalf of the Government of Malaysia. (Emphasis added.)

[46] It is to be noted however that this court in that case was not asked to determine the question whether a *fiat* by the Attorney General or the State Legal Advisor, as the case may be, is a requirement for legal representation by a private law practitioner. The case is therefore not authority for the proposition that no *fiat* is necessary where a public officer wishes to be represented by a private law practitioner of his choice.

[47] The word 'legal officer' is defined by s 2(2) of the GPA as follows:

'legal officer' includes a law officer, the Parliamentary Draftsman and a Federal Counsel, and, in the case of the States of Sabah and Sarawak, a law officer and a legally qualified member of the Federal or State Attorney General's Chambers, authorised by a law officer in accordance with section 24.

[48] A private law practitioner is not included in the above definition of 'legal officer', and the word 'officer' has the following meaning:

> 'Officer', in relation to a Government, includes a person in the permanent or temporary employment of such government and accordingly (but without prejudice to the generality of the foregoing) includes a Minister of such Government.

[49] By virtue of s 24(3) of the GPA, the appellant could of course be represented by a private law practitioner of his choice, but the private law practitioner must first obtain a *fiat* from the State Legal Adviser before he could act for the appellant, being a government officer.

[50] The appellant as the Chief Minister of Penang was at all material times a 'State officer' within the meaning of s 24(3) of the GPA. No *fiat* by the State Legal Adviser of Penang was ever produced by the law firm representing him in the present action. No explanation was given as to why this was not done. It would have been easy for the appellant to obtain the *fiat* from the State Legal Advisor of Penang given his position as the Chief Minister of the State.

[51] In *Kerajaan Negeri Terengganu & Ors v Dr Syed Azman Syed Ahmad Nawawi & Ors (No 1)* [2013] 7 MLJ 52; [2013] 1 CLJ 107; [2012] MLRHU 1003, the issue before the High Court was whether the State Government of Terengganu could be represented by a firm of advocates and solicitors in private practice. Yeoh Wee Siam J (as she then was) held, correctly in my view, that a private law firm could only be allowed to represent the state government upon proof that the firm had been duly retained or had been given a *fiat* by the State Legal Adviser of Terengganu.

[52] I am mindful of the fact that the case was decided in the context of a state government suing as the plaintiff, but there is no reason why in my view the ratio cannot be applied to a case where a state government officer sues in his official capacity as the plaintiff, like the appellant in the present case.

[53] There was therefore a failure by the appellant to fulfill the requirements of s 24(2)(a) and 24(3) of the GPA when he appointed a private law practitioner to represent him in the action instead of being represented by a government legal officer as required by law.

[54] Clearly, the private law practitioner who represented the appellant at all three levels of the court was not 'the recognised agent of such officer by whom all appearances, acts and applications in respect of such proceedings may be made or done on behalf of such officer' within the meaning of s 24(2)(a) of the GPA. This is the point of law raised by learned counsel for the respondents

which I think has merit and must be decided in favour of the respondents. A

[55] As the appellant was not properly represented, it follows that the writ and statement of claim including all cause papers filed on his behalf by his advocate were illegal and ought to be disregarded by the court, including this court. B

[56] It is true that the issue was not raised before the High Court but the issue of the appellant's capacity to sue was raised and fully argued before the Court of Appeal and was decided against the appellant when the Court of Appeal found that he had sued in his official capacity and not in his personal capacity. As I mentioned earlier in this judgment, the appellant must be taken to accept this finding as the truth as he did not appeal against the finding, which was adverse to him as far as it concerns the issue that he is now raising in this appeal. C D

[57] This court being the apex court cannot turn a blind eye on the breach of the law by the appellant. Nor can the breach be trivialised as a mere technicality not affecting the justice of the case on the ground that liability had been proved against the respondents. It is a serious transgression of the law that has the effect of nullifying the whole action filed by the appellant. E

[58] For the reasons aforesaid, the appellant's appeal is dismissed and the decision of the Court of Appeal is affirmed. F

There shall be no order as to costs as this case is of public interest.

Harmindar Singh FCJ (delivering majority judgment of the court): G

INTRODUCTION

[59] There are two appeals before us. The core issue in the appeals is whether an individual who holds political office or is a government official is disentitled from bringing an action in defamation in his official capacity. The appeals arose pursuant to the granting of leave on the following question: H

> Does the decision of the Federal Court in *Chong Chieng Jen v Government of State of Sarawak & Anor* [2019] 3 MLJ 300; [2019] 1 CLJ 329 allow a Government Official to sue for defamation in his or her official capacity bearing in mind the decision in *Derbyshire County Council v Times Newspapers Ltd and others* [1993] 1 All ER 1011, not being applicable under Malaysian law? I

[60] Underpinning the core issue in the appeals, as is usually the case, is the obvious tension between the competing interests of freedom of expression and

the protection of a person's reputation. We may all have heard of the saying: 'sticks and stones may break my bones but words can never hurt me'. But that seems a little antiquated today and will not find endorsement in the law of defamation. And rightly so. Words or speech can have extremes of being useful when they are uplifting or enlightening or harmful when they are dangerous and devastating. The worst case is undoubtedly speech calculated to incite racial or religious hatred. That can hurt a whole country.

[61] The essence of speech was noted by celebrated author Rodney Smolla in his book, *Free Speech in an Open Society* (1992) Chap 1:

> Speech may be uplifting, enlightening, and profound; but it is often degrading, redundant, and trivial. Speech may be abstract and theoretical, a near cousin to thought, but it is often concrete and immediate, filled with calls to action, intertwined with conduct. Speech may be rational, contemplative, orderly, organised, and soft; but it is often emotional, raucous, chaotic, untidy, and loud. Speech may be soothing and comfortable; but it is often vexatious and noisome. Speech may confirm and affirm; it may be patriotic and supportive of prevailing values and order; but it may also be challenging, threatening, and seditious, perhaps even treasonous.

[62] Its effects notwithstanding, free speech is essential to the proper functioning of a democracy because it facilitates informed decision making and democratic participation by citizens (see E Barendt, *Freedom of Speech* (1985) Oxford University Press). The framers of our Federal Constitution thought so too and hence we have art 10. So, we already have a constitutional dimension to the common law freedom of speech principles unlike many countries.

[63] The value of reputation is also not in doubt. Shakespeare observed that a 'purse' is merely 'trash' when compared to the value of a 'good name' (W Shakespeare, *Othello,* Act III Scene iii). It is quite a paradox then that the function of the law of defamation is the protection of both free speech and one's good name. As this case will amply demonstrate, finding the right balance, or a judicious balance as some prefer to call it, in the protection of both seemingly opposing interests, becomes key and is a duty the courts have readily acknowledged and accepted although getting the balance right is somewhat contentious.

[64] At the outset of the hearing of the appeals, counsel for the appellant applied to withdraw the appeal against the respondent Ruslan Kassim as he had passed away since the appeals were filed. Accordingly, Appeal No 02(f)-61–07 of 2019(W) was struck out with a further order, as requested by both parties, that there be no judgments enforced by or against the estate of the deceased, Ruslan Kassim. So, only one appeal remained for consideration.

THE MATERIAL FACTS

[65] The relevant background facts leading to the filing of the present appeals, as revealed in the judgments of the courts below and the parties' submissions, can be stated as follows. For convenience, the parties will be referred to as they were in the court of first instance or by their names as abbreviated.

[66] The plaintiff, Lim Guan Eng, who is the appellant here, was at the relevant time, the Chief Minister of the State of Pulau Pinang ('Penang)', the State Assemblyman for Air Puteh, and the Member of Parliament for Bagan. The third defendant is a political organisation known as Pertubuhan Pribumi Perkasa Malaysia ('Perkasa'). The first defendant, Ruslan Kassim, was the Chief Information Officer whereas the second defendant, Ibrahim Ali, the President of Perkasa. The 5th defendant is The New Straits Times Press (M) Sdn Bhd ('NST'). The fourth defendant was the editor-in-chief of the New Sunday Times and Berita Minggu, both published by NST. The sixth defendant is the editor-in-chief of Mingguan Malaysia published by the seventh defendant, Utusan Melayu (M) Bhd ('Utusan').

[67] The dispute began when the plaintiff made an official visit to Singapore from 11 December August 2011. A media statement issued by the plaintiff's press secretary on 12 August 2011 stated that the purpose of the visit was to develop investment potential and promote medical tourism. In the course of the visit, the plaintiff attended a dinner together with his officers and one Datuk Seri Kalimullah Hassan ('Kalimullah') and the Chief Executive of Temasek Holdings.

[68] On 1 October 2011, Ruslan Kassim issued a press statement. In essence, the press statement:

(a) suggested that the plaintiff attended a secret meeting between the political parties DAP and PAP, together with Kalimullah and one Datuk Muhammad Azman Yahya ('Azman');

(b) sought the meeting agenda to be disclosed;

(c) questioned whether Kalimullah and Azman had previously organised such meetings between DAP and PAP; and

(d) stated that the whole of Malaysia was entitled to question the loyalty of the plaintiff, Kalimullah and Azman in relation to the visit.

[69] Ruslan Kassim then sent the press statement to the Chief Editors of *NST* and *Utusan* via SMS. The next day, on 2 October 2011, the *NST* published an article in their weekly English newspaper, the *Sunday Times*. The

article was entitled 'Three queried over dinner with Singapore politicans'. This was followed by publication in the Malay language newspaper Berita Minggu which carried the title 'Desak perjelas pertemuan sulit DAP, PAP Perkasa percaya Azman, Kalimullah ada maklumaf'. *Utusan* also published an article based on the same story in their weekly newspaper, Mingguan Malaysia, entitled 'Kalimullah, Azman perlu jelaskan isu jumpa PAP' based on the same press statement.

[70] Not surprisingly, the plaintiff sued the defendants for defamation in the said publications. The plaintiff contended that:

(a) the press statement and the articles published pursuant thereto (collectively, the 'impugned statements') were defamatory of him;

(b) Ruslan Kassim had caused the press statement to be issued and its contents published in the media, either personally or on the authority or complicity of Ibrahim Ali and Perkasa, the second and third defendants; and

(c) the fourth defendant was responsible for the publication of the articles in *NST*, whereas the sixth defendant was responsible for the publication by *Utusan*.

AT THE HIGH COURT

[71] After a full trial, the High Court allowed the plaintiff's claim. The findings of the High Court can be summarised as follows:

(a) the impugned statements were defamatory of the plaintiff. They called into question his loyalty as a Chief Minister and citizen of his country, insinuated his involvement in a secret meeting contrary to national interest, and gave the impression of the plaintiff's tendency to disclose national secrets to foreign forces;

(b) the impugned statements were in fact untrue. This was evidenced by the subsequent statements of apology tendered by Ruslan Kassim to Azman, *NST* to Kalimullah, and *Utusan* to Kalimullah. *NST* and *Utusan* had acknowledged that their reports, based on Ruslan Kassim's press statement, was without foundation or basis;

(c) malice could be inferred from the defendants' conduct in publishing the impugned statements without caring about the truth of their contents;

(d) the defences of justification and fair comment, relied upon by the first to third defendants, were rejected. The defences of qualified privilege, *Reynolds* public interest, and fair comment, raised by the fourth to seventh defendants, were also rejected; and

(e) having found the defendants liable, a global figure of RM550,000 for general and aggravated damages was awarded to the plaintiff. A

[72] Notably, the issue of the plaintiff's locus standi, and the question of whether the plaintiff was suing in his personal or official capacity, were not pleaded nor raised in the High Court. B

AT THE COURT OF APPEAL

[73] Only the first, second and third defendants appealed against the High Court's decision on liability and quantum. The plaintiff cross-appealed on quantum. The Court of Appeal affirmed the findings of the High Court in respect of liability. The salient findings can be summarised as follows: C

(a) the second defendant, Ibrahim Ali, and Perkasa attempted to raise an issue concerning Perkasa's capacity to be sued as a registered society under the Societies Act 1966. The issue was not raised in the High Court. It was held that the objection should have been raised as a preliminary issue, not after the conclusion of trial, and should not be an issue at the appellate stage. The issue was an afterthought and Perkasa had waived any right to object; D E

(b) the trial judge had not erred in finding that the impugned statements were defamatory and in rejecting the defences advanced by the defendants; and

(c) the trial judge had, however, erred in awarding aggravated damages as part of the global award. Only general damages ought to be awarded. Damages were reduced to RM50,000 for each set of defendants. F

[74] The Court of Appeal thus dismissed all the defendants' grounds of appeal in respect of liability as being without merit. However, having agreed with the trial judge on liability, the Court of Appeal nevertheless allowed the appeals and dismissed the plaintiff's claim on the following grounds: G

(a) the Court of Appeal relied on its recent previous decision in *Utusan Melayu (M) Bhd v Dato' Sri DiRaja Hj Adnan bin Hj Yaakob* [2016] 5 MLJ 56; [2016] 5 CLJ 857 ('Adnan Yaakob'), where the plaintiff was held to have no locus standi to sue for defamation in his official capacity as the Menteri Besar of Pahang. In that case, the Court of Appeal had accepted and applied the principle in *Derbyshire County Council v Times Newspapers Ltd and others* [1993] 1 All ER 1011 ('Derbyshire'). There were striking similarities between that case and the present case; H I

(b) under the *Derbyshire* principle, a democratically-elected government and holders of public office should be open to uninhibited public criticism in respect of public administration and affairs. To allow the

government or public office holders to sue for defamation would be an undesirable fetter on the freedom of speech. However, the principle does not restrict the right of an individual holding public office from bringing a defamation suit in his personal capacity, where his individual reputation may have been wrongly impaired;

(c) even assuming that the common law *Derbyshire* principle was not part of Malaysian law, the same reasoning would emanate from the right to freedom of speech in art 10 of the Federal Constitution. Article 10 includes the right to discuss government;

(d) the plaintiff's counsel was the same as the counsel for the Menteri Besar in the *Adnan Yaakub* case. In that case, learned counsel had accepted the applicability of the *Derbyshire* principle in Malaysia, but argued that his client was suing in his personal capacity; and

(e) the plaintiff in the present case was suing in his official capacity. The findings of the High Court on defamation and damages were based on the plaintiff's capacity as the Chief Minister of Penang. The personal capacity exception to the *Derbyshire* principle does not apply. Thus, applying the *Derbyshire* principle 'as conceded by learned counsel', the plaintiff's claim must be dismissed.

[75] Notably, the issue of the plaintiff's locus or capacity to bring the action was not raised in the memorandum of appeal or by the parties' in their written submissions. It appeared to have been raised by the Court of Appeal on its own motion in light of its decision in the *Adnan Yaakub* case.

SUBMISSIONS

[76] The plaintiff, who is the appellant here, contended that the issues raised in the instant appeal had been addressed by this court in *Chong Chieng Jen v Government of State of Sarawak & Anor* [2019] 3 MLJ 300; [2019] 1 CLJ 329 ('Chong Chieng Jen') where the application of *Derbyshire County Council v Times Newspaper Ltd & Ors*, was rejected. The decision of the Court of Appeal in the instant case was therefore erroneous as this court in *Chong Chieng Jen* had decided that a government authority was not prevented from bringing a defamation action due to the *Derbyshire* principle. By extension, since the plaintiff was a government official even if suing in his official capacity (which the plaintiff denied), he was permitted to do so under Malaysian law.

[77] In any event, the plaintiff contended that even if *Derbyshire* applied, the plaintiff had brought the action in his personal capacity as evidenced at the trial and would come within the proviso of that decision. If the action in defamation was initiated by an individual and not as a class, it would be reasonable to assume that the action is personal in nature.

[78] It was also argued that Defamation Act 1957 does not provide for any prohibitions on the species of protagonist able to commence actions for libel. An individual public official is just as capable of being defamed as is any ordinary citizen. Both share the right to dignity and reputation and are guaranteed equal rights under the Constitution. *Derbyshire* decided that a public official is entitled to the protection of his dignity and reputation irrespective of whether he or she sues in a personal or official capacity.

[79] It was further submitted that there is not a single common law authority which effectively restricts the rights of the plaintiff in bringing an action for defamation in his personal or his official capacity. The converse is the case. The provisions of s 3 of the Government Proceedings Act 1956 ('the GPA 1956') and s 3 of the Civil Law Act 1956 ('the CLA 1956'), and also the absence of a prohibitive provision in the Defamation Act 1957 would not have prevented the plaintiff's action from being instituted.

[80] The plaintiff, accordingly, sought for the decision of the Court of Appeal to be set aside and the decision of the High Court be reinstated with costs.

[81] The defendants/respondents (now only the second and third defendants as they were in the High Court) in turn argued that the High Court and the Court of Appeal had made concurrent findings of fact that the plaintiff was suing in his official capacity. It is settled law that government officials can only sue for defamation in their personal capacity and not in their official capacity; and the case of *Chong Chieng Jen* was not applicable as it dealt with a state government and not a public officer.

[82] It was further argued that all individuals may sue for defamation in their personal capacity. Government officials may sue in their official capacity provided that the statutory requirements in the GPA 1956 are complied with. Among others, a government official must be authorised by the Minister or the State Secretary, and be represented by a legal officer. The plaintiff, as found by the Court of Appeal, had sued in his official capacity but failed to comply with the requirements in the GPA 1956. As such, the proceedings were void and the appeal must be dismissed.

ANALYSIS AND DECISION

[83] At the outset, it can be observed that there was no issue that the plaintiff had been defamed in his reputation by the impugned statements. The defendants had, however, contended in the courts below that the impugned statements were not defamatory of the plaintiff but merely legitimate queries on the reasons for the official visit to Singapore.

[84] As only the first to third defendants are involved in the present appeal (with the first defendant Ruslan Kassim now excluded by reason of his demise), it is appropriate to set out the press statement issued by Ruslan Kassim as revealed in the judgment of the Court of Appeal (at para [14]):

> PERKASA 01102011: Perkasa meminta Datuk Muhamad Azman Yahya tampil memberikan penjelasan, betulkah pada 12hb Ogos 2011 yang lalu Datuk Seri Kalimullah Hassan dan Lim Guan Eng Setiausaha Agung DAP dan Ketua Menteri Pulau Pinang telah mengadakan pertemuan sulit di samping makan malam bersama dengan seorang pemimpin kanan daripada Parti PAP di Singapura.
>
> Jika benar maka kita ingin tahu apakah agenda yang telah dibincangkan oleh ketiga-tiga mereka pada malam tersebut? Apakah ianya berkaitan dengan rahsia negara?
>
> Perkasa juga ingin tahu daripada Datuk Muhamad Azman Yahya ... betulkah Datuk Seri Kalimullah Hassan telah kerap kali mengatur perjumpaan antara pemimpin-pemimpin DAP dengan Pemimpin-pemimpin PAP dari Singapura? ... Jika benar maka seluruh rakyat
>
> Malaysia berhak mempersoal dan mempertikaikan di manakah Kiblat, kesetiaan dan loyalty mereka sekarang? ...
>
> Perkasa ingin memberi amaran kepada seluruh rakyat Malaysia jangan ada di antara kita yang cuba untuk menjadi alat atau ejen Negara asing dan cuba untuk menjadi petuafang di negaranya sendiri. lngatlah pesanan orang tua-tua di mana bumi dipijak di situlah sepatutnya langit dijunjung. Kalau tak ada angin masakan pohon bergoyang.
>
> Ruslan Kasim,
>
> Ketua Penerangan Perkasa Malaysia 1hb Okt 2011.

[85] The Court of Appeal agreed with the finding of the High Court that the words complained of were defamatory of the plaintiff. The High Court, in particular, noted that the words, read as a whole, even though couched in terms of requests and questions, questioned the loyalty of the plaintiff, as the Chief Minister of Penang and as a citizen of Malaysia, towards his country (at para [35] of the judgment). It can hardly be doubted that the plaintiff was singled out by name and specifically targeted in the press statement in which his loyalty was questioned.

[86] The law in respect of what amounts to defamatory matter is well-settled. An imputation would be defamatory if its effect is to expose the plaintiff, in the eyes of the community, to hatred, ridicule or contempt or to lower him or her in their estimation or to cause him or her to be shunned and avoided by them (see *Dato' Seri Anwar bin Ibrahim v The New Straits Times Press (M) Sdn Bhd & Anor* [2010] 2 MLJ 492; [2010] 3 AMR 514 ('Anwar Ibrahim v NST'); *Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Berhad & Anor* [1973] 2 MLJ 56; *JB Jeyaretnam v Goh Chok Tong* [1985] 1 MLJ 334; *Tun Datuk Patinggi Haji Abdul-Rahman Ya'Kub v Bre Sdn Bhd & Ors* [1996] 1 MLJ

393; *Chok Foo Choo @ Chok Kee Lian v The China Press Bhd* [1999] 1 MLJ 371). A

[87] The defamatory nature of the imputation is to be judged by the ordinary and reasonable members of the community or an appreciable and reputable section of the community (see *Jones v Skelton* [1963] 3 All ER 952; *Peak v Tribune Co* [1909] 214 US 185; *Hepburn v TCN Channel Nine Pty Ltd* [1983] 2 NSWLR 682). The ordinary reasonable person has been held to be one of fair average intelligence (see *Slatyer v Daily Telegraph Newspaper Co Ltd* (1908) 6 CLR 1, who is not avid for scandal (see *Lewis v Daily Telegraph Ltd* [1964] AC 234) but who may engage in some degree of loose thinking (see *Morgan v Odhams Press Ltd and another* [1971] 2 All ER 1156) and reading between the lines (see *Farquhar v Bottom* [1980] 2 NSWLR 380), but who, at the same time, should not be unduly suspicious (see *Keogh v Incorporated Dental Hospital of Ireland* [1910] 2 IR 577). B C D

[88] To ascertain the meaning of the statement or publication, the plaintiff can rely on the natural and ordinary meaning or the innuendo meaning. The consideration of the meaning of the offending words involves an objective test (see *Jones v Skelton*). The offending words must be considered in the context of the whole article and not simply on isolated passages (see *Lee Kuan Yew v Derek Gwyn Davies & Ors* [1990] 1 MLJ 390; *Curistan v Times Newspapers Ltd* [2009] 2 WLR 149). In order to prove his claim in defamation, it is also essential that the offending words are not only defamatory and that they are published but also that they identify him as the person defamed. E F

[89] Considering the impugned statements as a whole, it was beyond dispute that ordinary and reasonable members of the community will see the plaintiff as a traitor to his country who is willing to divulge national secrets. It was not a case of making inquiries but rather putting forward serious allegations as to the loyalty of the plaintiff. It was not a case of words which were defamatory of a body or class of persons of which the plaintiff was a member. It was plainly a case where the defamatory words in question was specifically and personally targeted at the plaintiff as alluded to earlier. G H

[90] It was therefore unfortunate for the Court of Appeal to make the assumption that it was the plaintiff's administration that was criticized and not the plaintiff personally. The court found that the plaintiff's suit was made in his capacity as Chief Minister of Penang and that therefore the claim was made in his official capacity and not by him personally. The court held that since the exception to the *Derbyshire* principle did not apply to the facts and circumstances of the case, the plaintiff's claim must be dismissed (at para [48] of the judgment). I

[91] With respect, I do not think this was a correct assessment of the facts. The pleadings indicated that the action was brought by the plaintiff personally and not in his official capacity as Chief Minister. It was the plaintiff suing as a private citizen and not by the office of the Chief Minister or the Government of the State of Penang. In other words, the suit was brought as an individual and not by an organisation in the form of the government or a government body. The impugned statements had named the plaintiff and specifically referred to his disloyalty to the country both as Chief Minister and as a citizen.

[92] The sting of the statements was more a criticism of the plaintiff rather than his office or the Penang State Government. He was the one who had the capacity to divulge the secrets. I do not think, therefore, that the plaintiff was disentitled from bringing the action as an individual to protect his reputation (see *Knupffer v London Express Newspaper, Limited* [1944] AC 116; *Goldsmith and another v Bhoyrul and others* [1998] QB 459; *Lee Hsien Loong v Singapore Democratic Party and others and another suit* [2007] 1 SLR 675; [2006] SGHC 220 ('Lee Hsien Loong v SOP')).

[93] The last case cited in the foregoing paragraph, *Lee Hsien Loong v SOP,* serves as a suitable illustration as the facts there were somewhat similar. The plaintiffs in each of two suits were Mr Lee Hsien Loong, the Prime Minister of Singapore, and Mr Lee Kuan Yew, the Minister Mentor in the Prime Minister's office and a cabinet minister. The defendants were the Singapore Democratic Party ('SOP') and some of its office bearers.

[94] The plaintiffs, in their individual capacity, sued the defendants for publishing an allegedly defamatory article in an issue of the SOP's newspaper, *The New Democrat,* in or around February 2006. The High Court found that the sting in the article lay in the way the defendants highlighted the commonality between the government and the National Kidney Foundation, namely, the lack of transparency and accountability. By highlighting the striking resemblance between how the NKF operated and how Singapore was run, the defendants had all but directly accused the plaintiffs of being dishonest and unfit for public office.

[95] The defendants, however, denied that the words in question either referred to the plaintiffs or would be understood to refer to the plaintiffs. They argued that the article referred 'to the entire Government and the system of non-transparent and non-accountable governance' which the dominant ruling party, had built up over the years. It was further argued that the impugned words referred to the ruling party and the government related to these bodies as independent entities, and not to the plaintiffs in their personal capacity. The defendants cited the case of *Derbyshire,* in support of their proposition that a government or public body cannot be defamed and, hence, cannot sue for

defamation. The defendants contended that since there is authority that a government cannot sue for defamation, it is questionable whether individual members within a government have locus standi to sue.

[96] The arguments by the defendants were not accepted and the High Court held as follows:

> [35] It could not be disputed that the present actions were not brought by the Government. Instead, they were brought by two individuals suing not in their official capacity, but as private citizens who were concerned that their individual reputations had been tarnished by the publication of the Disputed Words and who had thence separately brought these proceedings for defamation. Like any other ordinary citizens, politicians too have the same recourse to the courts to protect their reputation, especially when defamatory statements about the Government or any political institution are capable of being understood to be referring to them. There are cases in which the language used is intended to refer to a body or class of persons so much so that every individual member of the body or class so referred to (whether expressly, impliedly or inferentially) may have a cause of action ...

[97] Similarly, the plaintiff in the instant case was suing in his individual capacity as a private citizen and not by the office of the Chief Minister or the state government to protect his personal reputation. It was not the Office of the Chief Minister or the state government which had instituted the suit. The impugned statements, as was noted earlier, had named the plaintiff and specifically referred to his disloyalty to the country both as Chief Minister and as a citizen. So, it was not so much the state government that was criticised, as in *Lee Hsien Loong v SOP,* but the plaintiff directly.

[98] In coming to this view, I have not overlooked the criticism by plaintiff's counsel that the issue of locus standi of the plaintiff to bring this action was never pleaded or argued in the High Court. Being a jurisdictional challenge, I think the Court of Appeal was quite right in raising this issue especially since the *Adnan Yaakub* decision, which was starkly on point, was staring at them. The important consideration is that the parties were given a chance to submit on this new issue and so they cannot claim prejudice. It was also a matter, I think, that could be decided by looking at the pleadings alone and did not require viva voce evidence. The cases cited in support of this argument, of *Eagle One Investment Ltd & Ors v Asia Pacific Higher Learning Sdn Bhd* [2020] MLJU 28; [2020] 3 CLJ 218 and *Hoecheong Products Co Ltd v Cargill Hong Kong Ltd* [1995] 1 HKC 625, are therefore, with respect, irrelevant and offer no assistance. For these reasons, I do not think this complaint by the plaintiff takes him very far.

[99] Be that as it may, the defendants in the instant appeal sought to raise yet another argument for the first time before us. This argument was neither

pleaded nor argued in the High Court and the Court of Appeal. The defendants argued that in the event the plaintiff was suing in his official capacity, he had to obtain authorisation from the Penang State Secretary to file the suit by virtue of s 25(1) of the Government Proceedings Act 1956 ('the GPA 1956'). By virtue of s 24(3) of the GPA 1956, the plaintiff's solicitors would have to have obtained a fiat/sanction from the Attorney-General or the State Legal Advisor before any Writ was filed. Since the provisions were not complied with, the proceedings are null and void.

[100] For convenience, ss 24 and 25 of the GPA 1956 are reproduced:

> 24 Appearance of law officers
>
> (1) Notwithstanding any written law —
>
> (a) in civil proceedings by or against the Federal Government a law officer, the Parliamentary Draftsman or a Federal Counsel, or, in the case of the States of Sabah and Sarawak, a legally qualified member of the Federal or State Attorney General's Chambers authorised by the Attorney General for the purpose; and
>
> (b) in civil proceedings by or against the Government of a State a law officer, the Parliamentary Draftsman or a Federal Counsel authorised by the Legal Adviser of such State, and, in the case of the States of Sabah and Sarawak, the State Attorney General or any legally qualified member of the State Attorney General's Chambers authorised by the State Attorney General for the purpose,
>
> may appear as advocate on behalf of such Government and may make and do all appearances, acts and applications in respect of such proceedings on behalf of the Government.
>
> (2) Notwithstanding any written law in civil proceedings to which a public officer is a party —
>
> (a) by virtue of his office; or
>
> (b) in his personal capacity, if the Attorney General certifies in writing that it is in the public interest that such officer should be represented by a legal officer,
>
> a legal officer may appear as advocate on behalf of such officer and shall be deemed to be the recognised agent of such officer by whom all appearances, acts and applications in respect of such proceedings may be made or done on behalf of such officer.
>
> (3) An advocate and solicitor of the High Court duly retained by the Attorney General in the case of civil proceedings by or against the Federal Government or a Federal officer, or by the Legal Adviser, or, in the case of the States of Sabah and Sarawak, by the State Attorney General in the case of civil proceedings by or against the Government of a State or a State officer, may appear as advocate on behalf of such Government or officer in such proceedings.

(4) In civil proceedings to which the Attorney General is a party under section 8 or 9, a law officer, the Parliamentary Draftsman or a Federal Counsel authorised by the Attorney General for the purpose, and, in the case of the States of Sabah and Sarawak, a legal officer, may appear as advocate and make and do all appearances, acts and applications in respect of such proceedings on behalf of the Attorney General.

*NOTE — For Sabah and Sarawak substitute the following paragraph for paragraph 24(2)(b): '(b) in his personal capacity, if —

(i) in the case of a Federal Officer, the Attorney General certifies in writing; and (ii) in the case of a State Officer, the State Attorney General certifies in writing; that it is in the public interest that such officer should be represented by a legal officer;' — see L.N. 67/1965.

25 Appearance of public officers

(1) Any public officer authorised by a Minister in respect of proceedings by or against the Federal Government or by the State Secretary, or, in the case of the States of Sabah and Sarawak, by the State Attorney General, in respect of proceedings by or against the Government of a State, to act for such Government in respect of any civil proceedings may appear as advocate on behalf of such Government and shall be deemed to be the recognised agent of such Government by whom all appearances, acts and applications in respect of such proceedings may be made or done on behalf of such Government.

(2) An authorisation under subsection (1) may be special in respect of any particular proceedings or general in respect of all proceedings or in respect of all proceedings of a particular class.

[101] Now, of course, since it was determined in the preceding discussion that the plaintiff had not sued in his official capacity but that it was a private suit brought in the plaintiff's personal capacity, the provisions of the GPA 1956 do not affect him.

[102] In any case, the two sections set out above are meant, as the heading shows, for the purpose of allowing law officers and public officers to appear in place of advocates and solicitors in a court proceeding. Under s 35 of the Legal Profession Act 1976 ('the LPA 1976'), an advocate and solicitor is given exclusive right to appear and plead in all Courts of Justice in Malaysia although other legal officers may also appear (see s 35(2)(a), (b), (ba), (c) of the LPA 1976). Section 38 of the LPA 1976 also sets out the persons named there who can act as advocate and solicitor and it includes the attorney general or the solicitor general or any other person acting under the authority of either of them.

[103] Viewing from this context, in the case of a public officer involved in civil proceedings as a litigant by virtue of his office, a legal officer may appear on his behalf as an advocate by relying on s 24(2) of the GPA 1956. So, not only can

such legal officer appear in court, the public officer enjoys the privilege of being represented by such legal officer without having to undergo the expense of having to engage an advocate and solicitor. By no stretch of any legal interpretation can it be deduced that such a public officer is compelled to be represented by a legal officer. The words 'a legal officer may appear' makes this plain and unambiguous.

[104] Moreover, this issue was settled, in my view, by the decision of this court in *Perbadanan Kemajuan Kraftangan Malaysia v DW Margaret a/p David Wilson (t/a Kreatif Kraf)* [2010] 2 MLJ 713; [2010] 5 CLJ 899. The court had to interpret a provision similar to the one in the instant case in the form of s 35 of the Perbadanan Kemajuan Kraftangan Malaysia Act 1979 in order to ascertain whether the plaintiff could engage private solicitors to act for it in civil proceedings. The impugned s 35 was fashioned as follows:

> 35 Civil proceedings
>
> Notwithstanding the provisions of any other written law —
>
> (a) any person holding the appointment of Federal Counsel and authorised by the Attorney-General for the purpose; or
>
> (b) any officer of the Perbadanan authorised by the Chairman or Deputy Chairman of the Perbadanan for the purpose,
>
> may institute any civil proceedings on behalf of the Perbadanan or a subsidiary corporation and may, on behalf of the Perbadanan or a subsidiary corporation, appear in and conduct any such proceedings by or against the Perbadanan or the subsidiary corporation and make and do all appearances, acts, and applications in respect of such proceedings.

[105] On this aspect, the court held (at headnote 6):

> (6) (per Heliliah FCJ) The word 'may' in the context of s 35 of the Act is to be construed as directory in nature. Thus the appellant like any other body corporate, could appoint private solicitors when it institutes or defends itself in civil proceedings. It also retained the discretion to be represented by a federal counsel authorised by the attorney general or by one of its officers authorised by its chairman or deputy chairman (see para 31).

[106] In practice, however, and coming back to the present case, it would be to the benefit of the public officer to be represented by the legal officer as all expenses would be settled by the government especially in a case involving vicarious liability of the government. Significantly, the public officer involved in civil proceedings in his personal capacity enjoys no such privilege unless the attorney general certifies in writing that it is in the public interest to do so lending credence to the argument that it is a privilege given to a public officer. So, as the law makes it plain, it is really a matter between the government and the public official. It must follow, therefore, that it was for the government to

take up this issue if it considered that its rights were in any way affected. It is not open to third parties like the defendants here to challenge this arrangement and decide for the plaintiff as to who should represent him. In any case, the defendants are not prejudiced in any way. For all these reasons, including notably the fact that this issue was neither pleaded nor argued in the courts below, the submissions by the defendants in this regard are misconceived and without merit.

PUBLIC OFFICIAL SUING FOR DEFAMATION

[107] This brings me neatly to the larger question of whether a government official can bring a defamation action if the defamatory material relates to the exercise of his official functions as opposed to only matters concerning his private life. This is somewhat related to the earlier issue of whether a claim is brought in his official or personal capacity but the question is now framed by a consideration of the contents of the claim rather than the manner in which the claim is brought.

[108] There is no express statutory provision governing this issue in the Defamation Act 1957 ('the Act'). The Act itself is quite scanty and it is left to the common law to fill in the gaps. It was asserted during submissions that this was a matter which was considered by the Court of Appeal below and eventually decided by applying the earlier Court of Appeal decision in *Adnan Yaakob.* It was also argued that this issue was considered as well by this court in *Chong Chieng Jen.* Before dealing with these cases, it may be helpful to consider how this question has been dealt with in other common law jurisdictions.

POSITION IN OTHER JURISDICTIONS

[109] Most of these cases relate to a governmental agency or an elected body performing quasi-judicial functions and the issue that arises in all of them is whether they were competent in law to bring defamation actions against individuals. It would appear that the precursor to all subsequent decisions on this subject is the case of *City of Chicago v Tribune Co* [1923] 307 Ill 595 ('City of Chicago'). The Supreme Court of Illinois had to contend with a libel action brought by the City of Chicago, a municipal corporation, against a local newspaper for publishing defamatory allegations. In affirming the decision by the trial court to dismiss the libel action, Thompson CJ observed (at pp 606–608):

> ... It is one of the fundamental principles, therefore, of the American system of government, that the people have the right to discuss their government without fear of being called to account in the courts for their expressions of opinion ...
>
> ... While in the early history of the struggle for freedom of speech the restrictions were enforced by criminal prosecutions, it is clear that a civil action is as great, if not

A a greater, restriction than a criminal prosecution. If the right to criticise the government is a privilege which, with the exceptions above enumerated, cannot be restricted, then all civil as well as criminal actions are forbidden ...

... It follows, therefore, that every citizen has a right to criticise an inefficient or corrupt government without fear of civil as well as criminal prosecution. This
B absolute privilege is founded on the principle that it is advantageous for the public interest that the citizen should not be in any way fettered in his statements, and where the public service or due administration of justice is involved he shall have the right to speak his mind freely.

C **[110]** It is interesting to note that Thompson CJ was not only advocating the barring of any civil action preventing suits for defamation by a government authority against critical individual citizens, but suggesting also that any criminal prosecution based on criticism of government has no place in
D American jurisprudence.

[111] Next is the decision of the five-member bench of the South African Supreme Court in *Die Spoorbond v South African Railways* [1946] AD 999. It concerned a libel action brought by South African Railways, a government
E department responsible for running the railways, against a newspaper over defamatory allegations in relation to the way the railways were run. The Supreme Court held that the government authority was not entitled to bring an action in defamation. Schreiner JA explained (at 1012):

F ... Nevertheless it seems to me that considerations of fairness and convenience are, on balance, distinctly against the recognition of a right in the Crown to sue the subject in a defamation action to protect that reputation. The normal means by which the Crown protects itself against attacks upon its management of the country's affairs is political action and not litigation, and it would, I think, be unfortunate if that practice were altered. At present certain kinds of criticism of
G those who manage the State's affairs may lead to criminal prosecutions, *while if the criticism consists of defamatory utterances against individual servants of the State actions for defamation will lie at their suit*. But subject to the risk of these sanctions and to the possible further risk, to which reference will presently be made, of being sued by the Crown for injurious falsehood, any subject is free to express his opinion upon the management of the country's affairs without fear of legal consequences. I have
H no doubt that it would involve a serious interference with the free expression of opinion hitherto enjoyed in this country if the wealth of the State, derived from the State's subjects, could be used to launch against those subjects actions for defamation because they have, falsely and unfairly it may be, criticised or condemned the management of the country. (Emphasis added.)

I **[112]** What is of particular significance in this decision is the recognition that even though a State could not sue for defamation, it was open to individual servants of the State to pursue actions for defamation in their personal capacities. Also noteworthy was the court's observation that it was abhorrent to

think that the taxes collected from its citizenry for running the State could be used to finance litigation against its own citizens.

[113] Twenty years later came the landmark decision of *New York Times Co v Sullivan* 376 US 254 (1964) ('NYT v Sullivan'), in which the US Supreme Court, for the first time, added a constitutional dimension to the protection of free speech and a free press. The court was required to determine the extent to which the constitutional protections for speech and press limit a state's power toward damages in a libel action brought by a public official against critics of his official conduct. This decision, by all accounts, had an enormous impact on American free speech values as it restricted the ability of public officials to sue for defamation. Some elaboration is required but it needs to be understood, at the outset, the social and political context of the times which undoubtedly influenced this decision.

[114] The case began in 1960. It was a time when the civil rights movement in the United States was gaining strength. A full-page editorial advertisement ('advertorial') entitled 'Heed Their Rising Voices' was published in the New York Times. The advertorial, which was sponsored by a group of religious leaders and prominent personalities, highlighted crimes and harassment perpetrated by, or with support or tacit approval of, some government officials against blacks and civil rights leaders in Montgomery, Alabama. In a nutshell, it called for the support of Martin Luther King Jr and the growing civil rights movement with the clear intent of driving the public debate on civil rights.

[115] The plaintiff, Sullivan, was a Montgomery City Commissioner whose individual responsibilities included supervision of the Police Department. The advertorial was critical of the Police Department but it contained some factual inaccuracies. Sullivan took issue with the advertorial and the criticism, even though he was not actually named in it. After filing suit for defamation, Sullivan was able to convince a Montgomery jury that his reputation was harmed by erroneous statements in the advertorial and was awarded damages in the sum of $500,000. This verdict was affirmed by the Supreme Court of Alabama. The Times then appealed to the US Supreme Court.

[116] The issue before the US Supreme Court was whether Alabama's libel law, by not requiring Sullivan to prove that the speech in question was motivated by actual malice, unconstitutionally infringed on the First Amendment's freedom of speech and freedom of press protections. In March 1964, the court issued a unanimous 9–0 decision holding that the Alabama court's verdict violated the First Amendment. The court ruled that the First Amendment of the US Constitution protects the publication of all statements, even false ones, about the conduct of public officials except when statements are made with actual malice (with knowledge that they are false or in reckless

A disregard to truth or falsity). Specifically, the court held that there was a violation of the safeguards of freedom of speech as provided in the First and Fourteenth Amendments of the US Constitution in the libel action brought by a public official against critics of his official conduct.

B **[117]** The issue acquired greater significance when the 'actual malice standard', as it came to be known, was extended to all 'public figures' in later US Supreme Court cases (see, for example, *Curtis Pub Co v Butts* 388 US 130 (1967)). This made it extremely difficult for public officials or public figures to win a defamation lawsuit in the United States because of the seemingly C impossible burden of proving the defendant's knowledge. This meant, as observed in *Anwar Ibrahim v NST*, that the media in the United States are more likely to get away with publishing false news than the media in any other jurisdiction. As long as the material is published in good faith, the concern with any ill-will towards anyone becomes irrelevant.

D

[118] It is widely acknowledged that *NYT v Sullivan* was an extraordinary decision at the time as it sought to protect the right of the press and of the general public to criticize public officials in the conduct of their duties by way E of a constitutional revision. This approach may have been particularly valuable given the extreme political controversy and polarisation which existed at the time.

[119] The significance of *NYT v Sullivan* to the instant case, and indeed to the F law of defamation in Malaysia as a whole, would be far-reaching in that a public official would be prohibited from recovering damages for a defamatory falsehood relating to his official conduct unless, of course, he proved that the statement was made with 'actual malice'.

G **[120]** Even so, although there is much to be commended for the pronouncements in *NYT v Sullivan* in relation to the importance of the protection of free speech and the media, the 'actual malice standard' has not been followed in any other common law jurisdiction. My first impression is that this test fails to strike the right balance between free speech and the H protection of reputation. It places the media in a powerful position without adequate checks which the law of defamation ought to provide. It also appears unfair and discriminatory in that only public figures are subjected to the standard. It may then deter persons of integrity and ability from seeking public office.

I

[121] Wittingly or unwittingly, the test protects falsehoods and there can be no public interest in disseminating falsehoods. As Lord Hobhouse observed in *Reynolds v Times Newspapers Ltd and others* [2001] 2 AC 127 at p 238 ('Reynolds'):

> No public interest is served by publishing or communicating disinformation. The working of a democratic society depends on the members of that society being informed not misinformed.

Seen in this way, the 'actual malice' standard does not provide any incentive for the press to get their facts right.

[122] In the same context, perhaps the test of responsible journalism advocated by the House of Lords in *Reynolds* provides a better balance in the way that it requires minimum standards of responsible conduct based on the multiple factors balancing test. In the way the test is set out, the press would have to take all reasonable care to ensure that they do not publish falsehoods. All professions know very well the duty of care in the conduct of their work. Strong justification is therefore needed for the media to be exempted or to enjoy some special dispensation.

[123] With added experience, a better balance was further struck with an off-shoot of the defence of privilege. This was the defence of reportage or neutral reporting where privilege can be claimed without verification of the truth if the news is of public interest and is reported in a fair, neutral and disinterested way without adopting any of the allegations made by parties in a dispute (see *Al-Fagih v HH Saudi Research & Marketing (UK) Ltd* [2001] EWCA Civ 1634; *Anwar Ibrahim v NST*; *Roberts and another v Gable and others* [2007] EWCA Civ 721; *Charman v Orion Publishing Group Ltd and others* [2007] EWCA Civ 972).

[124] Speaking on the defence of privilege, Baroness Hale in the House of Lords decision of *Jameel (Mohammed) and another v Wall Street Journal Europe Sprl* [2006] 3 WLR 642, characterised the *Reynolds* defence as one that 'springs from the general obligation of the press, media and other publishers to communicate important information upon matters of general public interest and the general right of the public to receive information'. Baroness Hale concluded: 'In truth, it is a defence of publication in the public interest' (at p 685).

[125] There may indeed be other ways of providing a better balance. Perhaps a useful takeaway from *NYT v Sullivan* to balance the two interests would be to require the plaintiff, in certain circumstances, to bear the burden of proving the falsity of the defamatory imputation. So, no liability can be imposed where falsity is not established by the plaintiff. In this way, the focus of the inquiry would shift to whether the imputation is true or false. Establishing falsity would be in the interest of the plaintiff as it would go a long way in rehabilitating his reputation.

[126] In *NYT v Sullivan,* however, the way in which the 'actual malice' standard is contrived only serves to reallocate focus away from the truth such that the inquiry is now completely fixated on the state of mind of the defendant. It cannot be right, except for occasions of privilege or reportage, as noted earlier, that the law of defamation is unconcerned with the adjudication of truth where libel is alleged.

[127] Now, learned counsel for the plaintiff in the instant case relied heavily on *NYT v Sullivan* in his submissions. However, for the reasons I have stated, I do not think the case, and especially the 'actual malice' test, supports any of his propositions. In order not to be misunderstood, I do acknowledge that publications on matters of grave public interest, such as public health and safety, for example, which may turn out to be untrue with the benefit of hindsight, are still deserving of protection. It is only that the 'actual malice' test is not the best way to achieve this. As mentioned earlier, it tilts the scales too far.

[128] Placing the burden of proving falsity of the statement on the plaintiff, however, is a far more interesting proposition (see *Philadelphia Newspapers Inc v Hepps* 475 US 767 (1986)). It seems the obvious way for a plaintiff to secure vindication of his reputation. So, until such time as full arguments are canvassed in an appropriate case in the future, and the 'actual malice' test as advocated in *NYT v Sullivan* in defamation cases is shown to be desirable, the test ought not to be followed in our jurisdiction.

[129] Moving on, the three preceding cases came to be considered in *Derbyshire*. In that case, Derbyshire County Council, a local authority, brought an action for damages for libel against Times Newspapers Ltd, in respect of articles published in The Sunday Times questioning the propriety of investments made for the Council's superannuation fund.

[130] The appeal before the House of Lords concerned the preliminary issue of whether the local authority had a cause of action against the defendants. The House of Lords held that at common law, a local authority does not have the right to maintain an action for damages for defamation. The reasoning of Lord Keith of Kinkel can be summarised thus:

(a) a local authority has features that distinguish it from other corporations. It is a governmental authority which is democratically elected. 'It is of the highest public importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism. The threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech';

(b) there are rights available to private citizens that government institutions are not in a position to exercise, unless it is in the public interest to do so. It is contrary to the public interest for organs of government to have a right to sue for libel. Such actions would place an undesirable fetter on the freedom of speech; and

(c) in the case of a local authority under the control of a political party, it is difficult to say that the authority has any reputation of its own.

[131] More importantly, in the context of the instant case, the House of Lords suggested obiter that individual officers of government bodies may sue for defamation at 1020):

> ... A publication attacking the activities of the authority will necessarily be an attack on the body of councillors which represents the controlling party, or on the executives who carry on the day to day management of its affairs. If the individual reputation of any of these is wrongly impaired by the publication any of these can himself bring proceedings for defamation ...

[132] Post-*Derbyshire,* the courts have often held that while a government and its organs cannot sue for defamation, an individual public officer can do so. No distinction is made whether the public officer is suing in an official capacity or a personal capacity. On the contrary, the cases expressly recognised that an individual public officer can sue for defamation in respect of statements concerning his work performance in a government body. The only requirement is that the officer is sufficiently identified in the statements complained of.

[133] The first of these cases was a decision by the New South Wales Court of Appeal, Australia in *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680 ('Ballina Shire Council') where the principal question to be decided, for our purpose, was whether the plaintiff being a council incorporated under the Local Government Act has the right, power or authority to commence and maintain an action for damages for defamation. At issue was also whether the court ought to follow the decision in *Derbyshire* and hold that a local council, whose members are popularly elected, was not entitled to maintain an action for damages for defamation.

[134] An important consideration to the decision was the postulation of a democratically elected institution as perceived by Gleeson CJ in the following way (at p 691):

> The idea of a democracy is that people are encouraged to express their criticisms, even their wrong-headed criticisms, of elected governmental institutions, in the expectation that this process will improve the quality of the government. The fact that the institutions are democratically elected is supposed to mean that, through a process of political debate and decision, the citizens in a community govern themselves. To treat governmental institutions as having a 'governing reputation'

A which the common law will protect against criticism on the part of citizens is, to my mind, incongruous. I regard the matter as turning upon the concept of reputation, and the nature of the reputation which the law of defamation sets out to protect. I understand that concept in its application to individuals (including individual politicians), trading corporations and other bodies, but I have the greatest difficulty
B with the concept in its application to the governing reputation of an elected governmental institution. The right of an individual, even one in public life, to his or her personal reputation is one thing. Such a right can be recognised and protected by the law without undue interference with the right of free speech. On the other hand, to maintain that an elected governmental institution has a right to a
C reputation as a governing body is to contend for the existence of something that is incompatible with the very process to which the body owes its existence.

[135] Another member of the panel, Kirby P, considered how a local authority could respond to defamatory allegations and observed (at p 707):

D Whilst some of these observations do not apply to a local government body, many do. A local government authority may convene meetings. It may publish assertions which will often be privileged. It may respond to criticism by media releases of its own which, in the heat of local controversy, will usually attract attention. It may set up a local enquiry. It may conduct public hearings and investigations. It may even
E pass ordinances dealing with matters the subject of controversy which are within its powers. It is entirely misconceived for such a public organ of government to use public funds, levied from rate-payers, to sue a rate-payer for a publication of statements — 'false and unfair though they may be' — by which the public body has been criticised or condemned.

F

[136] The court by majority (Mahoney JA dissenting) held that the Council, although a statutory corporation, was not empowered by legislation creating it or by common law to maintain an action for damages for defamation. In relation the issue which concerns the instant appeal, that is, whether individual
G members of the Council can sue for defamation, Kirby P said:

Subject to any constitutional principles which apply, *the foregoing analysis does not, of course, prevent individual members of the Council who claim that they have been defamed and are sufficiently identified by the matter complained of, from suing in their*
H *own right for the individual wrong suffered*. This is how the long established entitlement of individual participants in public life to sue for damages for defamation can be reconciled with the disentitlement to sue of the public organs of government themselves. Thus members of Parliament (such as Mr Uren) may, subject to the constitutional principle, sue for the wrong which they claim they have suffered as an individual. But not the Parliament itself. An individual public servant
I or official (like Ms Morosi) may sue in defamation. But not the public authority to which that individual is appointed or by which he or she is employed. The mayor and councillors, as individuals, may, subject to the Constitution, sue Mr Ringland. But not the Council itself. Its reputation is not only distinct from that of its councillors, officers and employees. (Emphasis added.)

[137] The same viewpoint was expressed in a number of cases. For example in *Hill v Church of Scientology of Toronto* [1995] 2 SCR 1130 (Canadian Supreme Court), per Cory J:

> The fact that persons are employed by the government does not mean that their reputation is automatically divided into two parts, one related to their personal life and the other to their employment status. To accept the appellants' position would mean that identical defamatory comments would be subject to two different laws, one applicable to government employees, the other to the rest of society. Government employment cannot be a basis for such distinction. Reputation is an integral and fundamentally important aspect of every individual it exists for everyone quite apart from employment ... While it might be easy to differentiate between the extreme examples set forth by the appellants, the grey area between those extremes is too varied to draw any effective line of distinction. (Emphasis added.)

[138] Also in *Montague (Township) v Page* [2006] OJ No 331 (Ontario Superior Court of Justice), where a municipal corporation brought an action for damages against an individual citizen who vehemently criticized the council's fire department failure to respond to a fire in sufficient time, Pedlar J observed:

> I accept the reasoning of the House of Lords, as expressed in the *Derbyshire County Council* case, and those cases which have adopted the same. Factors taken into consideration in arriving at this decision include not only the inequality of resources between a government and a citizen, but also the troubling issue of the use of public funds, obtained from citizens through taxation, to sue them for criticizing that same government. *The right of individual members of the government to sue for defamation levels that playing field, and helps to mitigate the concern about recruiting the best candidates for public life.* To some extent, anyone entering public life does so with a certain expectation of public scrutiny and criticism, without putting themselves at the mercy of defamatory statements being made about them with impunity ... *statements made about that government. which are on their face capable in law of being defamatory of the government, are also defamatory of, and may be reasonably understood to refer to every member of that government. in which case every member may have a cause of action.* (Emphasis added.)

[139] Further, in *McLaughlin and others v London Borough of Lambeth and another* [2010] EWHC 2726 (Queens' Bench Division, High Court of England and Wales), per Tugendhat J:

> [T]he right to sue of any individual who carried on the day to day management of the affairs of a governmental body was subject to no limitation other than the requirement that the words complained of should refer to, and be defamatory of, that individual. If this be the case, it would follow that the individual would always have a right to sue in defamation, provided that he can fund the litigation from his own resources, or obtain funding from the resources of someone other than the governmental body ...

> *There is no principle precluding individuals from suing in cases where what is impugned is their conduct in the carriage of the business of a governmental body.* (Emphasis added.)

[140] And, in *Sankie Mthembi-Mahanyele v Mail & Guardian Ltd and Anor* [2004] 3 ALL SA 511 (South African Supreme Court), per Mthiyane JA:

> *[I]s a distinction to be drawn between members of government acting as a corporate body, and individual members of government singled out for their conduct? ... The criticisms made by the appellant and by Milo of Joffe J's decision to deny a cabinet minister locus standi to sue for defamation when the words complained of relate to performance of work as a cabinet minister are, with respect, well-founded.* A blanket immunity for defaming cabinet ministers would undermine the protection of dignity. It would give the public, and the media in particular, a licence to publish defamatory material unless the plaintiff can prove malice. In elevating freedom of expression above dignity in this way the decision simply goes too far. A balance must be struck. (Emphasis added.)

[141] This issue has also come up for consideration in a number of cases in Singapore. As noted earlier, the courts there have consistently declined to prohibit public officials from suing for defamation, and have upheld defamation claims brought by Prime Ministers in their own name on a number of occasions. In gist, the courts there have held that an individual member of a government body may sue as long as the statement about the body is capable of interpreted as referring to the individual.

[142] For example, in *Tang Liang Hong v Lee Kuan Yew & Anor and other appeals* [1998] 1 SLR 97 (Singapore Court of Appeal), the Prime Minister and leaders of the ruling political party brought actions for defamation in respect of statements alleging impropriety in purchasing properties, allegations that they were liars and engaged in a criminal conspiracy to discredit others. Per LP Thean JA (at [116]–[117]):

> In the cases before us, the plaintiffs are individuals suing as private citizens. *None of them brought the actions in their official capacity. Even under English law, a prime minister or a minister in office may sue in their private capacity for damages* in respect of defamatory matters published of them and depending on the circumstances may recover substantial damages ... politicians, like any other citizens, do not forfeit the protection of their reputations merely because they have entered the political arena and assumed high offices. Freedom of expression is perfectly legitimate so long as it does not encroach upon the realm of defamation ... No one is free to defame with impunity another person, irrespective of whether such person is a politician or ordinary citizen. (Emphasis added.)

[143] What appears to be axiomatic from the diaspora of decisions on the issue regarding defamation suits being brought by government bodies or government officials can be summarised as follows. Firstly, although there

needs to be a balance in the protection of free speech on the one hand and the protection of individual reputations on the other, freedom of speech and expression remains sacrosanct and should be protected at all costs. It is worth noting that some of the jurisdictions from which the above decisions have emerged do have very similar constitutional protections to our own constitutional guarantees of freedom of expression as enshrined in art 10(1)(a) of the Federal Constitution.

[144] Secondly, it is an anathema to a modern constitutional democracy to permit elected government authority to commence actions for damages for defamation against its citizens for the simple reason that it is those citizens who decide on that government or authority being placed in power. In other words, an elected governmental institution owes its very survival to those voting citizens and to the process bringing about its existence. In similar vein, it is also incompatible that government litigation against its own citizens be funded by those very citizens who contribute to their coffers.

[145] Thirdly, if, however, the impugned defamatory publications actually identify individuals in government in their attacks rather than being blanket critiques of government policy or action per se, then those individuals so identified have every right to commence actions in their personal capacities, if their reputations have been affected as a result. So, no distinction is drawn between a public officer being defamed for conduct in his official capacity and his personal capacity. As long as the defamatory statement is capable of being read as referring to the individual and not the government body as a whole, the individual officer is entitled to sue.

THE *ADNAN YAAKOB* DECISION

[146] Having considered the viewpoints in this area of the law in various jurisdictions, I come now to the instant case. As alluded to earlier, the Court of Appeal relied extensively on its earlier decision in *Adnan Yaakob.* In essence, the instant appeal is really a reassessment of the decision in *Adnan Yaakob* and it becomes necessary that I now deal with that case.

[147] In *Adnan Yaakob,* the plaintiff was the Menteri Besar of the State of Pahang. An article defamatory of him was published by the defendant newspaper. An application to strike out the plaintiff's suit under O 18 r 19 of the Rules of Court 2012 was dismissed by the High Court. The same panel hearing the instant appeal in the Court of Appeal allowed the appeal and struck out the plaintiff's suit. Much later, this decision was overturned by this court. The matter was remitted to the High Court for full trial. We were informed that the case in the High Court was eventually settled amicably by the parties.

[148] Now, the Court of Appeal in *Adnan Yaakob* was very much influenced by the *Derbyshire* case and held that by virtue of the plaintiff's public office as Menteri Besar and as elected representative, he should be open to public criticism and could never be defamed, hence, he ought to be precluded from suing for defamation. The court noted that the impugned article concerned him as the Menteri Besar, the elected representative and the political leader as well as the perceived weaknesses of his administration. It was held that the article in question did not impute an improper, unlawful or immoral conduct nor malign the plaintiff personally which would have entitled him to sue.

[149] In conclusion, the court held at para [36] of the judgment:

> [36] From the pleadings, the respondent has quite clearly pleaded that the article is an attack against him in his capacity as the Menteri Besar of the State of Pahang. The article, moreover, when read as a whole was plainly concerning the respondent as the Menteri Besar of the State of Pahang and his administration. It is merely a published criticism of the respondent's administration directed at him in his official capacity. We indeed consider the potential chilling effect on free speech should this appeal be dismissed and the respondent is allowed to commence this defamation suit in his official capacity against critics of his official conduct which is that the upshot of such dismissal would in our view allow persons holding public office to initiate a suit of this nature against any statement critical of them in their office which in consequence 'may prevent the publication of matters which it is desirable to make public' and no critical citizen can safely utter anything but faint praise about the public officials (*Derbyshire County Council v Times Newspapers Ltd and others* and *New York Times Co v Sullivan*). This will sadly result in political censorship of the most objectionable kind. It is our judgment, therefore, that the respondent by virtue of his public office, having sued in his official capacity which he may not have expressly described, has no locus standi to do so, but having done so, we are loath to allow the action to proceed any further as such the action must necessarily fail. This claim plainly comes within such category of claim that we can safely say to be obviously unsustainable. We reach the conclusion stated with little hesitation because there is, as it is obvious to us, the public interest considerations in this case which, on balance, does not favour the right of organs of government and public officials of the likes of the respondent to sue for defamation as this will inevitably stifle free speech. It must also be emphasised that in our decision, we do not decide on the truth or falsity of the article. We consider this appeal purely on the fundamental question of law emanating from the present action.

[150] It would appear, from the passage above, that the court was making a distinction between a plaintiff suing for defamation on matters wholly concerning his public office with those relating to some moral misconduct on personal matters. With that distinction, it was held that a public official is precluded from commencing a defamation action in the public interest in his official capacity as well as matters relating to his conduct in an official capacity. Only personal conduct, or as described there as 'personal capacity', was held to be actionable.

[151] Quite incongruously, however, the court went further to reassure such public officials who are unable to sue for matters concerning their official capacity that they are not without remedy. It was then suggested that such libel could be dealt with by criminal prosecutions under the Sedition Act 1948, the Penal Code, the Printing Presses and Publications Act 1984 and the Communications and Multimedia Act 1998. It was further asserted that 'the Government through the Public Prosecutor possesses the power to institute criminal prosecutions for the offences under these laws and such prosecutions would in our view be a more appropriate recourse to take to thwart the menace of malicious defamatory publications or words' (at para [32]).

[152] With respect, this was a curious proposition which was certainly at odds with what was stated earlier by the court. The court had cited with approval the decisions in *City of Chicago v The Tribune Co*, *NYT v Sullivan* and the *Derbyshire* case to conclude (at para [19]):

> [19] We consider that it is one of the fundamental principles that, in the exercise of the right to such freedom within the ambit of the Federal Constitution and other relevant laws, the public should have the right to discuss their government and public officials conducting public affairs of the government without fear of being called to account in the court for their expressions of opinion (*City of Chicago v The Tribune Company*). It does indeed go without saying that so far as the freedom of press is concerned, it flows from the right to freedom of speech and expression as guaranteed by art 10(1)(a) of the Federal Constitution the exercise of which shall at all times be protected and respected but subject to and no more than the permissible restrictions as may be imposed by federal law with clear and unequivocal language pursuant to art 10(2)(a) thereof.

[153] What is striking, and remarkably so, as advocated by the Court of Appeal in *Adnan Yaakob,* was that whilst defendants may be protected when commenting on the performance of public officials in their official capacity in defamation law, which are civil proceedings, they can, however, be sent to prison for making such libelous statements under criminal law. With respect, this wholly negates the right of every citizen to criticize an inefficient or corrupt government without fear of civil as well as criminal prosecution. The fear of the 'chilling effect', as rightly noted by the Court of Appeal, would then become complete and absolute.

[154] To recall, it was Thompson CJ in the *City of Chicago* case who pronounced that 'criminal prosecution based on criticism of government had no place in American jurisprudence'. Hence the incongruity in the Court of Appeal's observation is palpable. If it is in the public interest that Government and public officials be precluded from instituting defamation actions for criticisms of their performance, such public interest would apply more so for criminal prosecutions.

[155] Be that as it may, in the context of the present appeal, the Court of Appeal in *Adnan Yaakob* was plainly in error when interpreting the *Derbyshire* decision. This appears in para [16] of the judgment:

> [16] The generality of the above proposition, however, is not without any exception for Lord Keith of Kinkel in *Derbyshire County Council,* had laid down an exception which was stated in the following terms:
>
> > A publication attacking the activities of the authority will necessarily attack on the body of councillors which represents the controlling party, or on the executives who carry on the day to day management of its affairs. If the individual reputation of any of these is wrongly impaired by the publication any of these can himself bring proceedings for defamation.
>
> The above passage therefore clearly does not restrict the rights of individuals holding public office from suing in a defamation action in his personal capacity.

[156] With respect, Lord Keith, in the passage above, is referring explicitly to the individual reputations of those officials who are defamed whilst carrying out public functions in the day to day management of a public authority. That this must be the case is plain due to the reference at the outset to a publication attacking the activities of the authority. So, the passage really refers to attacks on individual executives when carrying on the functions of the authority and not in respect of any moral misconduct on personal matters unrelated to public functions. So, unless the Court of Appeal meant to say that a public official could bring a personal action in defamation with respect to matters involving his public duties, the reference to the passage in question is, with respect, misdirected.

[157] That this must be the case is supported by a passage in *Gatley on Libel and Slander* (12th Ed, 2013) at para 8.20 which states:

> The *Derbyshire* case makes clear that the decision does not affect the right to sue of an individual member or officer of a governmental body if the statement about the body is capable of being interpreted as referring to the individual. Indeed, the ability of the individual to sue seems to be regarded as a reason for denying such a right to the body.

[158] This would also be consistent with the case law in the various common law jurisdictions as alluded to earlier. As was noted earlier, the cases demonstrate quite plainly that individual reputations, whether in their official or personal capacity, are all deserving of protection. Where the impugned defamatory publications actually identify individuals in government in their attacks rather than being blanket critiques of government policy or action per se, then those individuals so identified have every right to commence actions in their personal capacities, if their reputations have been affected as a result. So, at the risk of being repetitive, no distinction is to be drawn between a public

officer being defamed for conduct in his official capacity and his personal capacity. As long as the defamatory statement is capable of being read as referring to the individual and not the government body as a whole, the individual officer is entitled to sue.

[159] Although the case law is compelling, I need to return to the question of why individual reputations are deserving of protection. To deal with this question, it is necessary to determine the more fundamental issue of the value of reputation and what really is being protected. In the early days, defamation law was only about the protection of individual reputations. The focus was on the falsity of the allegations resulting in dishonor to the intended target. It was a very serious matter. So, as it came to be recorded, King Alfred, more than a thousand years ago, provided that a slanderer should have his tongue cut out, unless he could redeem it with the price of his head. The honour of individuals was often adjudicated through dueling bouts (see VV Veeder, *The History and Theory of the Law of Defamation* (1903) 3 Columbia Law Review 546).

[160] In *Anwar bin Ibrahim v NST,* the value of an individual's reputation was explicated in the following fashion:

> [1] This case is about a man's reputation. What is reputation? There is no precise concept or definition. According to the *Oxford English Dictionary,* reputation means 'what is generally said or believed about a man's character or standing'. But reputation is different from character in that a person's character is what he or she in fact is whereas a person's reputation is what other people think he or she is (see *Plato Films Ltd & Ors v Speidel* [1961] AC 1090 at p 1138 per Lord Denning). In theory therefore, an unrevealed scoundrel may actually have an excellent reputation.
>
> [2] In any discussion of reputation, there is the customary or some say obligatory reference to Shakespeare's characterisation of 'good name' as the 'immediate jewel' of the soul (see W Shakespeare, *Othello,* Act III Scene iii). The 'purse' was 'trash' when compared to the value of a 'good name'. Some believe that reputation is a form of honour (see RC Post, *The Social Foundations of Defamation Law: Reputation and the Constitution* [1986] 74 California Law Review 691). So dishonour or loss of face is an absolute fall from grace. As Shakespeare depicted:
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> > Mine honour is my life, both grow in one,
> >
> > Take honour from me and my life is done. (W Shakespeare, *Richard II,* Act I Scene i)
>
> [3] Reputation has also been equated with the protection of dignity. In *Rosenblatt v Baer* (1966) 383 US 75, Stewart J observed:
>
> > The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being — a concept at the root of any system of ordered liberty.

[4] There is therefore no doubt as to the value of reputation even if articulating it or its limits with precision is complicated. In terms of its practicality and relation to modern life, Lord Nicholls in *Reynolds v Times Newspapers Ltd and others* [2001] 2 AC 127 at p 201 asserted:

> Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society which are fundamental to its well-being: whom to employ or work for, whom to promote, whom to do business with or to vote for. Once besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged for ever, especially if there is no opportunity to vindicate one's reputation.
>
> When this happens, society as well as the individual is the loser. For it should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family. Protection of his reputation is conducive to the public good. It is in the public interest that the reputation of public figures should not be debased falsely. In the political field, in order to make an informed choice, the electorate needs to be able to identify the good as well as the bad.

[161] It was only very much later that the law was extended to non-individuals when trading companies were able to bring actions for defamation as they were seen to have a 'trading character' which can be ruined (see *South Hetton Coal Co v North-Eastern News Association* [1894] 1 QB 133 at p 145). The conception of reputation as property (see RC Post, *The Social Foundations of Defamation Law: Reputation and the Constitution* [1986] 74 California Law Review 691) may have had some influence on this thinking.

[162] However, this thinking might be changing. In Australia, for example, certain corporations do not have a cause of action in defamation unless it has fewer than ten employees (see s 9 of the Defamation Act 2005 (NSW); *Redeemer Baptist School Ltd v Glossop; Redeemer Baptist School Ltd v Fairfax Community Newspapers Pty Ltd* [2006] NSWSC 1201). The Defamation Act 2005 (NSW) was enacted to promote uniform laws of defamation in Australia. Whatever may be the position taken in common law countries, it cannot be gainsaid that the concepts of 'honour', 'dignity', 'good name', 'integrity' and 'character' abound in court judgments to reflect the various attributes of the individual human self which are deserving of protection under the broad concept of reputation.

[163] It must follow, in my view, that a convincing case needs to be constructed with formidable arguments and justification before any individual reputation can be precluded from protection, either by policy or by law. My impression, however, is that arguments against any such preclusion are more compelling. These arguments against preclusion were noted earlier and are worth repeating. Foremost of the reasons is that a public official is capable of

being defamed in the same way as any other ordinary citizen as both share the right to dignity and reputation. Although antiquated by comparison to other Commonwealth countries, it is notable that the Defamation Act 1957 does not provide for any prohibitions on the species of protagonist permitted to commence actions for libel.

[164] As I had indicated earlier, although in a different context, it is discriminatory that the reputation of public officials in matters affecting their official functions is singled out for adverse treatment. There are far more influential persons in the community who affect public life. As all persons are guaranteed equal rights under the Federal Constitution, there is insufficient basis and justification for the inequitable treatment. Being singled out as such may also seriously deter capable and deserving persons from seeking public office. The reason is obvious. Without the protection, public officials will be powerless to defend against attacks by the media and others who will no doubt be in a powerful position as the necessary checks, which the law of defamation normally provides, will be limited.

[165] It may also be challenging to ascertain whether the plaintiff public official is bringing the suit in relation to personal or official matters. In essence, the former relates to one's private life or previous character whilst the latter is concerned with a public official's fitness for office. It does not take much prescience or foresight to appreciate that the line will be blurry and many such claims may overlap as matters regarding a public official's private life might be relevant to his or her fitness for public office. *Ex hypothesi,* an arduous task awaits the judge who has to demarcate between the two.

[166] It is also no coincidence, as observed earlier, that no other Commonwealth country precludes defamation actions from being brought by individual plaintiffs in an official capacity or, in fact, in any capacity. Apart from the *Derbyshire* case, the Court of Appeal in *Adnan Yaakob* may have been inspired by the *NYT v Sullivan* case which comes closest to what the court was advocating where public figures are concerned. Even then, as mentioned earlier, defamation actions are not proscribed, only that the plaintiff has to contend with the defendant's state of mind to overcome the almost insurmountable 'actual malice' standard.

[167] It must, however, be conceded that the effect is the same, in that public officials would not obtain damages for defamation unless they proved actual malice. In fairness, perhaps, the effect of *Adnan Yaakob* in that the law should require politicians to tolerate more robust criticism and legitimate scrutiny is not unappealing but that it may have come ahead of its time. At the present time, our society is more inclined towards deference to persons in authority, with public image and perceived respectability enjoying a premium over

freedom of speech. The scales may, however, be tilted differently over time.

[168] For all these reasons, it is my judgment that a public official must enjoy the same rights as other citizens and be allowed to sue for damages for defamation in any individual capacity whether in relation to personal or official matters. He need not avail himself to the provisions of the Government Proceedings Act 1956. Accordingly, the decision in the *Adnan Yaakob* case cannot be sustained.

[169] As it turned out, the Court of Appeal in the instant case, found similarly that the plaintiff/appellant was suing in his official capacity as Chief Minister of the State of Penang and not in his personal capacity. The court took the position that they ought to follow their own decision in *Adnan Yaakob* as the principle of law applied equally to the facts and circumstances in the case before them. Not having the benefit of hindsight in that the *Adnan Yaakob* was later set aside by the Federal Court, the Court of Appeal was certainly obliged to follow their earlier decision. For the same reasons as indicated earlier, this decision cannot also be sustained.

APPLICATION OF *CHONG CHIENG JEN*

[170] I come now to the outstanding issue of the application of the case of *Chong Chieng Jen,*. This single question of law, upon which leave was granted, was very much reliant on this case and as such, we are compelled to deal with it. I begin with the facts.

[171] The plaintiff, the State Government of Sarawak, sued the defendant, a member of parliament and a state assemblyman, for defamation. The alleged defamatory statements were statements made by the defendant concerning the mismanagement of state finances, published in the media. The central issue was whether the state government has the right to bring an action for defamation, in light of the *Derbyshire* principle.

[172] This court unanimously held that the *Derbyshire* principle is not applicable in Malaysia. The reasoning of the court may be summarised thus:

(a) the *Derbyshire* principle is a principle of the common law in England. The court should be wary of importing English common law principles when legislation in Malaysia has already provided for the principles of law to be applied;

(b) the right of the Federal and state governments to sue is a statutory right, specifically provided in s 3 of the GPA 1956. The statutory right of the state government to sue in civil proceedings is not subject to the common law of England;

(c) under the GPA 1956, the right of the government to bring civil proceedings is broadly defined to include any proceeding whatsoever of a civil nature before the court. This includes the right to sue for defamation;

(d) under s 3 of the Civil Law Act 1956, the common law of England can only be applied where no provision has been made by any written law in Malaysia. Since s 3 of the GPA 1956 is a specific law in force concerning the right of the government to sue, the common law principle in *Derbyshire* does not apply; and

(e) the freedom of speech provided in art 10 Federal Constitution is not absolute. Article 10(2)(a) specifically authorises Parliament to impose restrictions to provide for defamation. Thus, the *Derbyshire* principle is not suitable for application in the Malaysian context.

[173] Now, of course, this decision stands in stark contrast to all the cases discussed earlier, which all provided that it is an anathema to a modern constitutional democracy to permit elected government authority to commence actions for damages for defamation against its citizens. Perhaps Gleeson CJ described it best in the *Ballina Shire Council* case (at p 691):

> [T]o maintain that an elected governmental institution has a right to a reputation as a governing body is to contend for the existence of something that is incompatible with the *very* process to which the body owes its existence.

[174] To put it in less elegant terms, the elected government authority owes its very being to those voting citizens upon whom it now seeks to recover damages for defamation. It is irreconcilable, *a fortiori,* that government litigation against its own citizens be funded by those very citizens who contribute to their coffers. Such governmental authority already enjoys easy access to the media. It will be easy for the authority to ensure that its rejoinders are well reported in all the media. Further, in the case of an elected authority, to say that it has a governing reputation is awkward as the authority would be temporarily controlled by one political party or another. The reputation is really that of the governing party. As aptly noted by Kirby P in *Ballina Shire Council,* 'The Council's reputation must depend upon the opinion of citizens, earned or lost in the democratic political debate'.

[175] Also, reliance on s 3 of the GPA 1956 alone, as the Court appears to have done to answer the issue, is problematic as that section is merely an enabling provision which allows the government to commence civil proceedings against any person. Such a provision is found in all Commonwealth countries. Even in the United Kingdom, the birthplace of the *Derbyshire* decision, we will find the Crown Proceedings Act 1947 ('the CPA 1947') which provides for civil proceedings by or against the Crown and the

procedure in which such proceedings can be undertaken. Our GPA 1956 is in fact modelled after the CPA 1947. In the early days, the Crown could always bring civil proceedings against its citizens but the citizens could only do so against the Crown via a difficult and circuitous route. The CPA 1947 was passed to make it easier for ordinary citizens to sue the UK Government and to get around the old feudal myth that the Crown could do no wrong (see *Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd* [2008] 4 MLJ 641; *Sabil Mulia (M) Sdn Bhd v Pengarah Hospital Tengku Ampuan Rahimah & Ors* [2005]3 MLJ 325).

[176] The upshot is that although the UK Government could always sue for any private law infringement, it is now contrary to the public interest to do so in view of the *Derbyshire* decision for the reason, amongst others, that to admit such actions would place an undesirable fetter on freedom of speech. So, the question of whether it would be against the public interest for a government to sue its citizens for damages for defamation in Malaysia, like in all other Commonwealth countries, must remain a live question.

[177] However, the plaintiff, by raising the principle in *Chong Chieng Jen,* is not applying to revisit that case even though he has cited numerous cases against it. Curiously though, the plaintiff seeks to rely on it to assert that he is entitled to sue. In short, the plaintiff submits that if the government can sue for defamation, then by extension the plaintiff, as a public official, should be equally entitled to commence such an action. To preclude a public officer from suing for defamation, it was argued, would lead to an anomalous position.

[178] On first impression, the argument seems persuasive. However, in my considered view, the decision in *Chong Chieng Jen* is not applicable to the instant proceedings. That case, as submitted by the defendants, was about the right of the State Government of Sarawak to sue for defamation. The present case is about an individual's right, albeit a public official, to bring about such proceedings. As was elaborated at length in the foregoing discussion, the considerations that apply are not the same. In practice, it would be both remarkable and awkward for both the government and the public officer to sue for the same libel. Hence the *Chong Chieng Jen* case offers no assistance to the plaintiff as it is irrelevant.

DAMAGES

[179] The final issue is with regard to the award of damages. The High Court had awarded a global sum of RM550,000 as general and aggravated damages. This amount was apportioned between the various sets of defendants. The first to the third defendants were ordered to pay the sum of RM150,000 out of the RM550,000. On appeal to the Court of Appeal, the order of the High Court

was set aside and the court reduced the award of damages for the first to the third defendants to a sum of RM50,000 as general damages. Guided by the case of *Liew Yew Tiam & Ors v Cheah Cheng Hoc & Ors* [2001] 2 CLJ 385, the court held that this award was in keeping with the principle that joint tortfeasors should be made liable only to a single award.

[180] Now, the award of damages is meant to be compensatory and not a scheme for untold wealth. In a case where there is damage to reputation, the compensation must include such sum as would vindicate his or her good name and take into account the distress, hurt and humiliation which the defamatory publication has caused. The primary aim of a remedy in defamation came up for discussion in *Anwar Ibrahim v NST,* with the following outcome:

> [82] However, compensation in defamation is not quite the same as in other torts. Compensation for a successful plaintiff in most areas of the law involves the intention to place such plaintiff, as far as money is capable of doing so, in the position the plaintiff would have been but for the defendant's wrongdoing. The tort of defamation, however, exposes the defendant to a monetary remedy that includes both vindication of the plaintiff to the public and as consolation to him for a wrong done (see *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at p 150). Compensation in this sense might also include an element of social disapproval of the defendant's conduct not unlike punishment in criminal cases. This is probably why although the law presumes harm to reputation, there will invariably be lengthy accounts in defamation trials of the plaintiff's hurt, outrage, distress, dignity and the like rather than proof of any actual damage to reputation. Lord Diplock in *Cassell & Co Ltd v Broome & Anor* [1972] AC 1027 at p 1125 lent credence to this idea in a seminal passage where he said: 'The harm caused to the plaintiff by the publication of a libel upon him often lies in his own feelings, what he thinks other people are thinking of him, than in any actual change made manifest in their attitude towards him'.
>
> [83] To muddy the waters further, although there can be no action in defamation for a publication merely because it injures a person's feelings, damages can be awarded for the plaintiff's injured feelings including the hurt, anxiety, loss of self-esteem, the sense *of* indignity and the outrage felt by the plaintiff once it is established that such person's reputation has been harmed. Of course, such damages are awarded because these are consequences that flow naturally from the publication of the defamatory matter (see *Carson v John Fairfax & Sons Pty Ltd* (1993) 178 CLR 44at p 71).
>
> [84] The question that arises is therefore this. Should the primary aim of a remedy in defamation be in satisfying the plaintiff's hurt feelings etc or should it be in vindicating his or her standing in the community? In my respectful view, if we concern ourselves primarily with putting the plaintiff in the position he or she was before the defendant's wrongdoing, vindication of his or her standing in the community should be the focus of the remedy rather than any award of large sums of money for the plaintiffs hurt feelings. Plaintiff may however also feel that only substantial damages may vindicate or restore their reputation and good name. But I think that vindication of reputation can also be achieved through non-monetary means. For example, the best vindication would be an almost immediate and

A prominent apology, correction or retraction by the defendant after publication of defamatory material. In that situation, there would be minimal damages. It should also follow that a court-ordered correction on a defendant after a trial would serve just as well if not better in the vindication or restoration of a damaged reputation than large money damages.

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[181] To summarise, it is really vindication which mostly puts the plaintiff back into the position he or she would have been but for the defendant's disparaging publication. It is unfortunate that the common law's obsession with money damages has put other ways of providing vindication to the C successful plaintiff in the shadows. In this context, I fully endorse the views of the authors of *Gatley on Libel and Slander* (12th Ed), that '[A] shift towards a general practice of declaring falsity, allowing a right of reply, or ordering correction would have a significant effect on the general structure of defamation law and litigation, which has been largely shaped on the D assumption that the remedy is an award of damages' (at para 9.1).

[182] It is, of course, lamentable that by the time the court has pronounced judgment, vindication has come late for the successful plaintiff and, in the E meantime, much damage has been done. Even so, in the most serious cases of defamation in respect of integrity and honour, I cannot imagine general damages to exceed the quantum that is usually awarded in personal injury claims to a claimant who is fully disabled. These injuries are in most cases permanent and irreversible whilst a man's reputation may be restored and the F damage can in some cases be transient in character.

[183] Axiomatically, a man who has been defamed cannot be said to be in a worse position than one who has lost the use of vital parts of his or her anatomy. In *McCarey v Associated Newspapers Ltd (No 2)* [1965] 2 QB 86 at p 109, G Diplock LJ said: 'I do not believe that the law today is more jealous of a man's reputation than of his life and limb'. Thirty years later, in *John v MGN Ltd* [1996] 2 All ER 35 ('John v MGN'), the UK Court of Appeal, in similar vein, said:

H It is in our view offensive to public opinion, and rightly so, that a defamation plaintiff should recover damages for injury to reputation greater, perhaps by a significant factor, than if that same plaintiff had been rendered a helpless cripple or an insensate vegetable. The time has in our view come when judges, and counsel, should be free to draw the attention of juries to these comparisons.

I **[184]** Now, of course, there are other views which reject such comparisons and attempts to equiparate damages for personal injuries and damages for defamation (see *Cassell & Co Ltd v Broome and another* [1972] 1 All ER 801 at p 824). There is no doubting that the two torts are different and the law awards damages differently although the compensation principle remains the same.

Those views notwithstanding, it is essential in the public interest, in my assessment, to maintain a sense of proportion between damages for each of those wrongdoings to avoid legitimate public criticism that the law favours one over the other. It would in this way serve as a check, as Sir Thomas Bingham MR (later Lord Bingham) observed in *John v MGN,* on the reasonableness of the award of damages for defamation.

[185] Be that as it may, it is trite that damages for defamation are 'at large' in the sense that there is no accepted scale or formula and they are awarded on the merits of each case based on accepted guidelines. In assessing damages, the nature and gravity of the libel is the most important factor. The 'more closely it touches the plaintiffs personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be' (see *John v MGN*).

[186] The next important factor is the mode and extent of the publication. A libel published to millions has a greater potential to cause damage than a libel published to a few. Also, unlike traditional media which may have a temporary effect, internet publications may remain in circulation for the indefinite future (see *Barrick Gold Corporation v Lopehandia et al* (2004) 71 OR (3d) 416).

[187] Other factors would include the conduct of the claimant, his credibility, his position and standing and the subjective impact the libel has had on him, the absence or refusal of any retraction or apology and the conduct of the defendant from the time when the libel was published down to the verdict (see *Gatley* at para 9.5). An award of damages may be higher in a case where the defendant asserts the truth of the libel and refuses any retraction or apology. This may be compounded when the cross-examination at the trial is conducted in an insulting fashion. On the other hand, damages may be reduced where the defendant publicly admits the falsity and expresses regret of what was published.

[188] Some of these factors when taken together may warrant an award of aggravated damages. This would be especially the case when taking into account the conduct of the defendant, his conduct of the case and his state of mind (see *Gatley* at para 9.18). In other words, it will be the aggravating conduct of the defendant that would be decisive in determining whether aggravated damages ought to be awarded. For example, a clear case where aggravated damages is merited would be where the defendant had no genuine belief in the truth of what was being published or was guilty of such willful blindness that although there were strong grounds of suspicion that what was being published was false, the defendant deliberately avoids making further inquiries in order to forestall the suspicion turning into certainty.

[189] Taking the matter further, if the defendant acted with the motive of material gain in the belief that he would be better off financially if he violated the plaintiff's rights than if he did not, then an award of exemplary damages can be considered. However, since exemplary damages are punitive in nature and can have a chilling effect on free speech, it should be a matter of legal principle that damages of this nature can only be justified in rare and exceptional circumstances where it is clearly established that the defendant is guilty of the wilful commission of a tort and it is necessary that he be then punished by disgorging whatever economic advantage or profits he has made as a result of his unlawful conduct. In essence, it must be conduct motivated by mercenary considerations which call for punitive damages (see *John v MGN*).

[190] In the instant case, the Court of Appeal disagreed with the High Court and took the position (at para [31]) that the award of aggravated damages was 'incorrect in law'. The court further observed that aggravated damages are usually given in 'cases involving high handedness or oppressive action'. As these factors were absent, there was no basis for the High Court to award aggravated damages.

[191] With respect, aggravated damages are not confined to cases involving high handedness or oppressive actions which are more reminiscent of actions for damages for unlawful imprisonment or against other unlawful governmental actions. On the contrary, there are a variety of circumstances where aggravated damages can be justified as alluded to earlier. As a further example, the Court of Appeal in *Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal* [2018] 1 MLJ 784 through the judgment of Mohd Zawawi Salleh JCA (now FCJ) noted as follows:

> [32] Now, aggravated damages are classified as a species of compensatory damages, which are awarded as additional compensation where there has been intangible injury to the interest of personality of the plaintiff, and where this injury has been caused or exacerbated by the exceptional conduct of the defendant.

[192] In the instant case, false allegations of the most serious kind were levelled at the plaintiff who was holding the high position of Chief Minister. He was alleged to have revealed national secrets to a foreign government or in short, committing treason. The evidence further revealed, as found by the trial judge, that the defendants had no genuine belief in the truth of these allegations but recklessly pursued a variety of defences including justification. The defendants failed in both the High Court and Court of Appeal and the findings that these allegations were false and defamatory were affirmed in each case.

[193] In the circumstances, the High Court was more than justified in awarding compensatory and aggravated damages of RM150,000 which was

not manifestly excessive. It is trite law that appellate courts should be slow to reverse the trial judge on the question of the amount of damages. The appellate court will have jurisdiction to interfere in an award for damages in cases where the judge had acted on a wrong principle of law, or has misapprehended the facts, or has made, for clear reasons, a wholly erroneous estimate of the damage suffered. It must be a clear case where the damages awarded are manifestly excessive or manifestly inadequate (see *Davies and another v Powell Duffryn Associated Collieries Ltd* [1942] AC 601; *Flint v Lovell* [1935] 1 KB 354; *Topaiwah v Salleh* [1968] 1 MLJ 284; *Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal*).

[194] The High Court was also right to make a global award of damages for compensatory and aggravated damages. The accepted principle is that since such an award is concerned with the aggravation of damages due to the conduct of the defendant, no separate award for aggravated damages should be ordered. In practice, an award of a percentage increase from a normal compensatory award would be an acceptable approach in arriving at the global figure. It would also be unrealistic to allocate different amounts for injury to reputation, for vindication, for hurt feelings and for aggravation as some courts seem to be doing (see *Chin Choon @ Chin Tee Fut v Chua Jui Meng* [2005] 3 MLJ 494; [2005] 2 CLJ 569; *Cairns v Modi; C v MGN Ltd* [2013] 1 WLR 1015).

CONCLUSION

[195] In conclusion, and for the reasons mentioned, the leave question can be answered in this way. A public officer when suing as an individual, whether he is suing in his official or personal capacity, is not prohibited from bringing an action for damages for defamation. In the event, the Court of Appeal was plainly in error when it was decided that public officials are precluded in the public interest from bringing a defamation action in their official capacity or in relation to matters affecting their official functions.

[196] My learned sister Nallini Pathmanathan FCJ has read this judgement in draft and has expressed agreement with it. Accordingly, the appeal is allowed with costs to the appellant. The orders made by the Court of Appeal are set aside. The orders of the High Court, in relation to the respondents here, are hereby restored.

Appeal allowed, COA's decision set aside; and High Court's decision restored.

Reported by Ashok Kumar